SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 439

WILOIL CORPORATION, APPELLANT,

vs.

COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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[fol. 4]

IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

Stipulation to Try Without Jury

It is hereby agreed that a trial by jury be dispensed with in the above stated case, and that the same be submitted to the decision of the Court to be heard and determined under the provisions of an Act, entitled "An Act to provide for the submission of civil cases to the decision of the court, and to dispense with trial by jury," approved the 22d day of April, 1874, (P. L. 109) subject, however, to a writ of error as in other cases, at the option of either party. It is also agreed that the three appeals filed at the above numbers may be consolidated and tried together.

December 14, 1932.

John Y. Scott, Deputy Attorney General. Weil, Christy & Weil, Attorneys for Deft. Co.

In Court of Common Pleas of Dauphin County

Stipulation as to Record to be Printed, Supreme Court Rule No. 55

It is hereby stipulated and agreed that the following papers appearing in the record in the Court of Common Pleas of Dauphin County, Pennsylvania, at No. 356 Commonwealth Docket, 1932, are not material to the issues involved and need not be printed, to wit: Commonwealth Exhibits "A", "B", "C" and "D", and Nos. "1", "2" and "3".

It is also stipulated and agreed that it is necessary to print only Exhibits "1", "2", "3" and "4" of defendant, [fol. 5] Wiloil Corporation; defendant's Exhibits "5", "6" and "7" being in fact duplicates of defendant's Exhibits "1", "3" and "4".

In lieu of printing Commonwealth exhibits, it is further stipulated and agreed that the amount of tax assessed is

correct; that the Commonwealth proceeded with due formality to assess and did assess the tax, and that the same is proper if—

(a) Under the facts such a tax is authorized to be assessed against defendant, Wiloil Corporation, by the terms of the Liquid Fuels Act of 1931, P. L. 149; and

(b) Under the facts the imposition of such a tax is not unconstitutional as imposing a burden upon interstate commerce.

All of the record not expressly excepted herein is to be printed.

Weil, Christy & Weil, Attorneys for Wiloil Corporation, Defendant. John Y. Scott, Deputy Attorney General for the Commonwealth of Pennsylvania.

Dated July 15, 1933.

[fol. 6] In Court of Common Pleas of Dauphin County

Statement of Evidence

Hearing before Honorable William M. Hargest, President Judge; Honorable Frank B. Wickersham, Additional Law Judge; Honorable John E. Fox, Additional Law Judge, 12th Judicial District of Pennsylvania, Courts of Dauphin County, Harrisburg, Penna., at Harrisburg, Pennsylvania, Wednesday Afternoon and Thursday morning, December 14 and 15, 1932. In Court Room No. 1, Dauphin County Court House, Harrisburgh, Pennsylvania.

Appearances

Honorable John Y. Scott, Deputy Attorney General, for the Commonwealth.

Weil, Christy & Weil, Esquires, by J. S. Christy, Esquire, Pittsburgh, Pa., for the Defendant.

Colloquy

Mr. Scott: If the Court please, I would like to present Mr. Christy, of the Pittsburgh Bar, who represents the Wiloil Company. Now, in this Wiloil Company case it

is an appeal from liquid fuel tax determinations made by the Department of Revenue, and both sides intend to introduce some testimony. I question very much if we can [fol. 7] finish before 4 o'clock, but if Your Honors desire it, we will start.

The Court (Judge Hargest): Yes, you may start.

By Mr. Krall:

I could start and introduce the papers that will create the jurisdiction of the Court, I could do that much.

The Court (Judge Hargest): All right. What is the number and term, WILL is it?

Mr. Scott: Yes, Wiloil Corporation.

The Court (Judge Hargest): Yes, Will.

——: Wiloil, W-i-l-o-i-l (spelling).

The Court: Oh, Wiloil.

Mr. Scott: Wiloil Corporation.

The Court (Judge Hargest): One word?

Mr. Scott: One word. And there are 3 cases, Your Honor, three appeals here that we would like to have considered together; they are Number 356, 357 and 358, Commonwealth Docket of 1932. I hand to the clerk the stipulation of counsel.

The Court (Judge Hargest): Fuel oil taxes?

Mr. Scott: Liquid fuels. I hand to the clerk stipulation of counsel, dispensing with a jury, and also requesting [fol. 8] that the—or agreeing that the 3 appeals may be heard together.

Now, Your Honor, the Liquid Fuels Tax Act imposes the duty upon the taxpayer, who is the distributor of liquid fuels, to file a report each month rather than yearly, as is the case in capital stock tax, and it is for that reason that 3 cases, 3 appeals, may be consolidated in a very simple manner. The 3 appeals here involved are appeals from the determinations as set up against the Wiloil Company for liquid fuels sold and delivered by them, or alleged to have been sold and delivered by them for the months of August, September and October, 1931. The determinations were set up under the provisions of the Liquid Fuels Tax Act of 1931. There is a separate appeal for each month, and we have asked that they all be heard at once. The same question is involved in each month.

The Court (Judge Hargest): What is the question?

Mr. Scott: The question is simply this: the Wiloil Company filed a report in each of these months, and in accordance with the law paid the tax according to their calculation. The taxing officers do not make the original calculation of tax due in liquid fuels cases. Subsequently an audit of the books of the Wiloil Company indicated that they had on their books sales as to individuals in Pennsylvania which were not reported in these 3 months, upon which no tax was paid. Those sales will show you exactly what they have, how many gallons are involved, and so forth. The Wiloil Company have a defense that, as was brought [fol. 9] out before the Board of Finance and Revenue, they claim that these are not sales and deliveries in Pennsylvania taxable under the law of Pennsylvania, but that these are in fact sales of gasoline which didn't take place in Pennsylvania at all, and which the Commonwealth has no right to tax, because they were sales in Interstate Commerce. The Act, of course, specifically prevents the Commonwealth from imposing burdens upon Interstate Commerce. Now, the question is, as I conceive it, where—not where, but whether or not there was a taxable transaction in this case; that is, was the sale and delivery which is taxed under the Liquid Fuels Tax Act, was it a transaction in Pennsylvania, or was it a transaction in another state, or so bound up with the shipment of gasoline from another state as to make it a transaction exempt for taxation because of Interstate Commerce? Have I stated the question? Now, I don't think you want any more preliminary statement of this. I would like to introduce into evidence the petition of the Wiloil for a redetermination, they call it resettlement, of tax on gasoline for the 3 months in question. To that is attached a photostatic copy of the determination which the law requires to be mailed to the corporation. These are simply to establish the jurisdiction of the Court. I would like to also introduce in evidence the petition and affidavit of the Secretary of the Wiloil Company, supporting the petition, which was presented to the Board of Finance and Revenue, requesting a review of the action of the Department of Revenue in refusing to grant the petition just introduced for redetermination. Attached to this petition is the action—cer- [fol. 10] tified copy of the action of the Board of Finance and Revenue thereon refusing the prayer of the petition. I have three of these, and I suppose they had better be

marked B, C and D, one set for August 1931, one for September 1931, and one for October 1931. Now, I think that establishes the jurisdiction.

(Petition of Wiloil Corporation for resettlement of tax on gasoline marked as Commonwealth's Exhibit "A"; petitions for review of liquid fuels tax—Wiloil Company, petitioner, August 1931, marked for identification Commonwealth's Exhibit "B"; Petition for review of liquid fuels tax—Wiloil Company, petitioner, September 1931, marked for identification as Commonwealth's Exhibit "C"; petition for review of liquid fuels tax—Wiloil Company, petitioner, October 1931, marked for identification as Commonwealth's Exhibit "D".)

The Court: (Judge Hargest): Well, now, we will adjourn until tomorrow morning at 10 o'clock.

Adjourned the Court until tomorrow morning at 10 o'clock.

Court adjourned at 4:17 o'clock P. M.

Harrisburg, Pa., Thursday Morning,
December 15, 1932.

Pursuant to the adjournment Court convened at 10:02 o'clock P. M., and proceeded to take testimony in the case of Commonwealth v. Wiloil Corporation, in the Court of Common Pleas of Dauphin County, Pennsylvania, entered to No. 356, 357 and 358, Commonwealth Docket, 1932, before [fol. 11] Honorable William M. Hargest, President Judge; Honorable Frank B. Wickersham, Additional Law Judge; Honorable John E. Fox, Additional Law Judge, 12th Judicial District of Pennsylvania, Courts of Dauphin County, Harrisburg, Pa., in Court Room No. 1, Dauphin County Court House, Harrisburg, Pa., whereupon the following proceedings were had.

The Court (Judge Hargest): Proceed, Mr. ——.

Mr. Scott: Are you ready to proceed with this? Mr. Fryburg, take the stand.

Claude H. Fryburg, having been duly sworn according to law, was examined as follows:

Direct examination.

By Mr. Scott:

Mr. Christy and myself wish to stipulate of record that the defendant, Wiloil Company, is the same as the Willock

Oil Company. The name was changed sometime in September of 1931, and consequently in some of the papers which will be introduced in evidence the name of the company appears Willock Oil Company, in others Wiloil Company. The Willock Oil Company was succeeded, by simply changing the name, by the Wiloil Company.

Mr. Christy: By due proceedings.

Q. What is your name, Mr. Fryburg?

A. Claude H. Fryburg.

Q. You are an officer of the Commonwealth of Pennsylvania?

[fol. 12] A. Assistant Commissioner of Liquid Fuels.

Q. And as such what are your duties, Mr. Fryburg?

A. Supervising internal auditing, supervising field auditing, assess additional taxes.

Q. By assess additional taxes, what do you mean?

A. The distributor makes a monthly report to our office stating the gallonage sold each month, and the taxes due the Commonwealth. We internally audit that first, if we are not satisfied with that we later make a field audit. If we find in the field audit that the figures, per the records of the company, do not agree with the report returned we assess the tax additional which is required.

Q. You set up, as I understand it, an additional determination for taxes?

A. We call the bill that we render "determination", yes.

Q. I see. Now, as I understand it, the distributor pays the tax as he has calculated it on his report at the time the report is filed?

A. That is correct.

Q. Consequently if you find anything further owing from the distributor it would require the making of an additional determination because you have already been paid at the filing of the report some of the tax which is really owed by the distributor for the month in question?

A. That is correct.

Q. As Assistant Commissioner of Liquid Fuels you have access to the records of the Bureau of Liquid Fuels?

A. Yes, all records.

[fol. 13] Q. And you have access to them and are in a position to identify them?

A. Correct.

Q. And I believe you said that the audits to determine additional tax are made under your direction?

A. That is right.

Q. Are these audits examined by you?

A. Personally inspected by me, everyone of them.

Q. Do you make any of them yourself, Mr. Fryburg?

A. No, I sometimes supervise them, the larger companies.

Q. I see. Mr. Fryburg, I show you 3 papers captioned "Report of Liquid Fuels." I wish you would tell me what they are (handing same to witness)?

The Court (Judge Hargest): Have they been identified?

Mr. Scott: No, I will have them identified.

(3 Reports of Liquid Fuels Tax marked for identification respectively as Commonwealth's Exhibits Nos. 1, 2 and 3; these Reports were later withdrawn and photostatic copies of the relevant portions thereof substituted therefor.)

Q. They have been marked for identification as Commonwealth's Exhibit 1, Commonwealth's Exhibit 2, Commonwealth's Exhibit 3, I show you these papers and ask you to tell me what they are? (Handing same to witness.)

[fol. 14] A. This is the distributor's monthly report supposedly of the gasoline that he sold, which he purchased, and which he has on hand——

Q. Of what company Mr. Fryburg?

A. Of the Wiloil Corporation, for the months of August, September and October, 1931, bearing the signature of the Treasurer of their company——

Q. Who is the Treasurer of the company?

A. Mr. S. M. Hamilton.

Q. How did these reports come into the possession of the Department, and when?

A. Their delivery through the mail must be in prior to the end of each calendar month. Upon receipt they are sent to our Internal Auditing Unit for——

Q. Just a minute, Mr. Fryburg, when were these actually received? Read off the month and the date of receipt?

A. The August Report was received in our unit on October 1st, 9:06 A. M. The October Report—the September Report was received on the 2nd of November, this is 1931,

11:07 A. M. The October 1931 received December 1st, 11:22 A. M.

Q. Now, Mr. Fryburg, I notice that in each of those reports there appear some papers which are attached to the report which look as if they are papers from a calculating machine; were those papers a part of the report as originally filed?

A. No, they were not.

Q. What are they?

A. They are a tabulation record of the gallonage of the Wiloil says that they purchased, as against the gallonage that the shipper claims they shipped to the Wiloil; also the [fol. 15] record that the railroad sends us every month of the tank cars of gasoline that is delivered during the month to the various distributors.

Q. Then those papers were not a part of the report as originally filed, and are simply papers prepared in the office of the Department?

A. That is correct.

Q. Now, I also notice, Mr. Fryburg, that on these reports appear certain pencil notations, specifically on the report for August, 1931, I find that the first figure on the report has been crossed out, and the pencil figure written above. Was that alteration on the report when it was originally submitted?

A. No, that was made by our internal unit.

Q. And the same also is correct with regard to other pencil notations on these reports?

A. Yes, they are all made by us in the office.

Q. They were not a part of the report as originally filed by the Wiloil Company?

A. No.

Mr. Scott: I would like to offer in evidence these 3 reports described by the witness, which have been identified as CX 1, being the report of the Willock Oil Corporation for August 1931; CX 2, being the report of the Willock Oil Corporation for September 1931; and CX 3, being the report of the Wiloil Corporation for October 1931. I would like to restrict this offer to the report as filed by the Wiloil Company. I do not wish to offer in evidence the pencil calculations of the taxing officer, nor the calculation sheets which have been attached thereto.

[fol. 16] Q. Now, Mr. Fryburg, I wish you would take these reports and tell me the amount of tax reported to be

due by the corporation, and the amounts paid by it at the time the report was filed, giving the month and the amount?

A. August, 1931, the gallonage was 30,545, money net $898.02.

Q. Now, by gallonage you mean that is the gallonage stated by the distributor as being subject to tax in his report, is that correct?

A. That is right.

Q. And the figure you gave is the calculation of tax due made by the distributor, is that correct?

A. That is correct.

Q. All right. Give it for the other months?

A. September, 1931, 30,752 gallons, $904.11. October 1931, 32,808, $964.56.

Q. I believe you said these accounts which you have read, the 3 amounts have been paid——

A. Have been paid, yes——

Q. At the time the reports were filed? Mr. Fryburg, subsequent to the filing of these reports did you make an audit of the affairs of the Wiloil Company, particularly with regard to its dealing in gasoline which may or may not have been taxable?

A. We did.

Q. What did that audit consist of, do you know?

A. A complete examination of all their purchase records, inventory records, and sales records.

Q. This audit was made where?

A. In Pittsburgh.

[fol. 17] Q. Is that the home office of the Wiloil Company?

A. As far as I know it is, yes.

Q. The audit was made in the office of Wiloil Company?

A. It was made in the home office of the Wiloil Company.

Q. And the records of Wiloil Company were shown to your auditors?

A. That is correct.

Q. By the company?

A. By the company.

Q. They made them available to you?

A. Yes.

Q. As a result of that audit what did you discover with regard to the reports as filed by the Wiloil Company?

A. We found in those 3 months audited that there were certain cars of gasoline which they had purchased and which had been shipped to other oil companies in Pennsyl-

vania which were not reported to us, and on which no tax was paid.

Q. Can you tell me how many of such cars there were in the month of August 1931?

A. There were 11 cars in August 1931?

Q. And these cars appeared on the books of the Wiloil Company to have been sold to whom?

A. Nine of them were sold to the Ace Oil Company in Philadelphia, two to the High Powered Gas Company in Philadelphia.

Q. What was the total gallonage of all of the 11 cars?

A. 111,345.

[fol. 18] Q. Now, as to the month of September, what cars during the month of September——

The Court (Judge Hargest): Just a moment there; do you want to give us the additional tax due there at this time?

By Mr. Scott: I will do that, yes.

Q. Having discovered the record of these cars, I understand that the Department set up an additional determination for tax, can you tell me how much that was, Mr. Fryburg, for the month of August?

A. I don't have the record right here, it is in my envelope there, I will have to get it.

(Witness leaves stand, procures envelope at counsel table, returns to stand.) The additional tax for August was $3,340.35.

The Court (Judge Wickersham): I did not get those figures.

A. $3,340.35.

The Court (Judge Fox): Were these sales made by the defendant?

A. Yes, sir.

Mr. Scott: I will go into that a little more, Your Honor.

Q. You have just said that these sales were made by the defendant, what did you discover upon your audit to indicate that these sales were made by the defendant?

A. We saw invoices to these 2 companies for these particular gallons, car numbers, in agreement with our rec-

ords; we saw their sales records which showed that those [fol. 19] sales had been made; we saw the purchase records for the same cars having been purchased.

Q. And that is on the books of the Wiloil Company?

A. That is all on the books of the Wiloil Company.

Q. And I presume you examined their ledger accounts, and were these entries upon the sales and purchase books, which were books of original entry, carried into the ledger accounts as charges against the Ace Oil and High Powered Gasoline?

A. Yes, they were carried on the Accounts Receivable Ledger.

Mr. Scott: Is that what you wanted to know, Your Honors?

The Court (Judge Fox): Yes.

Q. Now, as to the month of September, Mr. Fryburg, as a result of your audit, what gallonage did you discover in that month that was not reported on the report for the month of September 1931?

A. September 1931 we located 1 car shipped to the Ace Oil Company, Philadelphia, amounting to 8,078 gallons, additional tax due was $242.34.

Q. And this car you found in the sales record of the Wiloil Company, is that correct?

A. That is correct.

Q. You found it in their purchase records, is that correct?

A. That is correct.

[fol. 20] Q. And it was charged in their ledger to the Ace Oil Company?

A. That is correct.

Q. Now, as to the month of October 1931, will you tell me, what, if any, additional gallonage you found for that month?

A. October 1931, we found 1 car, 10,234 gallons, tax $307.02, to the Ace Oil Company of Philadelphia.

Q. And that car, also, to save time, appeared in the books as the other cars did?

A. That is correct.

Q. As a result of this auditing, Mr. Fryburg, did the Department assess an additional tax?

A. We assessed additional taxes on this audit amounting to $3,889.71.

Q. Is that the——
A. That is the total for the 3 items——
Q. For the 3 months——
A. I have previously quoted.
Q. And notice was sent to the company?
A. Determinations were sent to the company in due course.
Q. I see. Now, you say that these cars, 11 for August, 1 for September, and 1 for October did not in any way appear on the reports which were filed by the Company?
A. No, they did not.
Q. You found them by the examination of the company's records, as stated by you?
A. That is correct.
Q. And having this additional, you assessed the additional tax you have just stated?
[fol. 21] A. That is correct.

Mr. Scott: Cross-examine.

Cross-examination.

By Mr. Christy:

Q. Mr. Fryburg, this act went into effect in June 1931, didn't it?
A. June 1, 1931.
Q. And the Department hadn't come to a conclusion as to what the act fully meant at that time, had it?

The Court (Judge Hargest): What act, when it went into effect?
Mr. Christy: June and July.

A. Well, we had our own interpretations of the act.
Q. It was in doubt with the Department and also with the distributors?
A. No, I wouldn't say there was any doubt, we may have a difference of opinion with the distributors about certain articles in the act.
Q. Yes. Now, the Wiloil Corporation had been making sales to the Ace Oil Corporation, the High Powered Gasoline Company, located in Philadelphia, during the months of June and July of 1931, hadn't it?
A. Yes, they had.

Q. And they had been making return of the taxes for gasoline sold to those companies during June and July, hadn't they?

A. June and July were refunded, July a little later than they should have been, I believe.

[fol. 22] Mr. Christy: Just to save time, rather than put in all of these invoices of these different sales, we will stipulate that one confirmation, one invoice, and one bill of lading would satisfy for all the transactions, if that——

Mr. Scott: They are all exactly similar.

The Court (Judge Hargest): Yes.

Q. I show you invoice of Ace Oil Corporation——

The Court (Judge Wickersham): Marked exhibit, is it?

(Paper marked for identification as Defendant's Exhibit 1.)

Q. —dated August 1, 1931, I ask you if you didn't see——

The Court (Judge Wickersham): What is the Exhibit Number?

A. CX 1.

Mr. Christy: Defendant's Exhibit 1.

Q. And ask if you didn't see similar invoices for the months of June and July 1931, made to Ace Oil Corporation and High Powered Gasoline Corporation?

A. June, I think, was similar; July was not, July did not have the tax included.

Q. Very well. But you have seen those invoices in June?

A. We saw both months, June and July.

Q. And you were in touch with the railroad company in [fol. 23] June and July and you knew when these shipments came across the line?

A. We knew later on; we are usually a couple of months back on that work.

Q. Now, you make audit of the distributors in Pennsylvania occasionally whether you suspicion any wrong doing, don't you or not?

A. Quite often.

Q. And you made an audit of the Wiloil Corporation's books not for the purpose of ascertaining the gasoline that they had sold, and had not reported, but to determine the

question principally as to where the sale took place, wasn't that the purpose of the audit?

A. Well, we audited the Wiloil in our regular course of audits, we audit every distributor practically every 4 months.

Q. Yes.

A. You came in your regular order.

Q. But in the audit, the main purpose of making that audit was to determine from the records of the Wiloil Corporation a question of intention between the parties as to where the sale took place, and where title to the goods passed, wasn't that it?

A. No, we make our audits of all companies to determine whether there is any gallonage sold in Pennsylvania to other dealers that have not been reported to us and tax not paid on them.

Q. You knew about these shipments to Ace Oil Corporation, High Powered Corporation before you made the audit?

A. Yes, sir, we knew about those.

Q. And you knew that from the Wiloil Corporation, the defendant?

[fol. 24] A. We knew it from both parties.

Q. How did you know that from the Wiloil Corporation?

A. We were in consultation with Mr. Gahagan, the President of the Ace Oil Company. He was an unregistered distributor, he asked permission to buy gasoline from you if he paid you the tax. We consented to that arrangement.

Q. But isn't it a fact that the Wiloil Corporation sent you a letter before you made the audit reporting all these cars, and stating the circumstances under which the sales were made, and they were not the first distributor in Pennsylvania, and for that reason they were not liable for the tax, and for that reason refused to pay the tax? Didn't your Department receive a letter with these statements?

A. I never have received that letter personally, they may have received it in the Department.

Q. You didn't? Do you recall when you made the audit of the Wiloil Corporation?

A. The audit was completed in March 10, 1932.

(Paper marked for identification as Defendant's Exhibit 2.)

Q. I show you Defendant's Exhibit 2, being a copy of a letter addressed to the Department, do you remember ever having seen the original of that letter (handing same to witness)?

A. No, I wouldn't see that letter, that would go to the internal auditing unit, and they would attach it to the reports; we should have a copy of it in our correspondence file, Mr. Smith is looking for it.

[fol. 25] Redirect examination.

By Mr. Scott:

Q. Mr. Fryburg, Mr. Christy asked you about sales by the Wiloil Corporation in the month of June and July. Will you state whether or not the tax was paid on those sales?

A. To the Department?

Q. To the Department, by the Wiloil Corporation, June and July I am speaking of now?

A. I am trusting to memory, but as I remember it they were paid.

Q. Your audit did not disclose any indebtedness in the way of additional tax for those months due by the Wiloil Corporation?

A. No, not in June and July.

Q. Would that indicate to you that it had been paid?

A. It had been paid either prior or subsequent.

Mr. Scott: That is all. The Commonwealth rests, Your Honor.

Mr. Christy: Just a second. That is all.

Mr. Scott: Commonwealth rests, Your Honor. And it may be that we will call Mr. Fryburg back in rebuttal, because, as you apprehend, the question of Interstate Commerce will have to be brought in by the defense.

[fol. 26] Defendant's Case

Colloquy

Mr. Christy (calling): Mr. Hamilton.

Mr. Christy: If the Court please, we have our defense; and shall I explain it slightly before I begin?

The Court (Judge Hargest): Yes.

Mr. Christy: The Wiloil Corporation made sales of gasoline to the Ace Oil Corporation and High Powered Corporation. These corporations were located in Philadelphia and were distributors. The act went into effect on June 1, 1931, and the distributor wasn't very well acquainted, or probably didn't give the act proper construction, and the Department evidently didn't give the act proper construction. Now, all these invoices that we will show were invoiced f. o. b. Wilmington, Delaware, f. o. b. Wilmington, Delaware.

The Court (Judge Hargest): That is, you sold the oil?

Mr. Christy: We sold the taxable——

The Court (Judge Hargest): The person from whom you purchased it to sell sent it to the 2 oil companies?

Mr. Christy: The person from whom we purchased it shipped it from Wilmington, Delaware to Philadelphia where it was distributed, and that was taxable. But the in-[fol. 27] voices showed the price of the gasoline and also the tax. The Department saw these invoices. The Wiloil Company, as long as they were able to collect from the companies, paid the tax. When the gasoline bill itself became delinquent, to the extent of $28,000, they brought that delinquent account in to me to collect, and I saw the invoices, and the first thing I asked them, "Why have they invoiced that tax?" and they said that, "We are the permit holders in Pennsylvania and liable for the tax under the act." I, of course, advised them that it was an f. o. b. sale, Wilmington, Delaware, and that they were not liable for the tax. And immediately advised them to not return it under the regular sheets for the Department, but with the return for the other gas they had sold that was taxable, to write a letter to the Department and state that they had sold these cars f. o. b. Wilmington, Delaware to Philadelphia purchasers, and for that reason it was an Interstate Commerce transaction, and they weren't liable. Now, there was no attempt in any way to defraud the state. It was simply a mistake of interpretation, or construction, a mistake by the Wiloil Company and a mistake by the Department. Now, we will show that by the evidence.

[fol. 28] Simeon Hamilton, having been duly sworn according to law, was examined as follows:

Direct examination.

By Mr. Christy:

Q. What is your full name, Mr. Hamilton?
A. Simeon Milo Hamilton.
Q. Where do you reside?
A. Pittsburgh.
Q. Are you connected with the Wiloil Corporation?
A. I am Secretary and Treasurer.
Q. Secretary and Treasurer now?
A. Yes, sir.
Q. And what were you at the time of the transaction complained of?
A. The same.
Q. — in this case?
A. The same.
Q. Secretary and Treasurer. Are you personally familiar with these transactions?
A. Yes, sir.
Q. Will you explain to the Court how these sales were made, that is were they made through you or through a Philadelphia agent?
A. The deal was made through our Philadelphia agent, Mr. Dietrich.
Q. Just a little louder.
A. The deal itself was made through our agent, Mr. Dietrich, at Philadelphia; after he made the deal he got in touch with us by telephone or wire and we immediately confirmed the sale by our formal sales order by mail.
Q. Did he have authority to settle upon the terms of sale [fol. 29] or were those sales required to be confirmed by the Pittsburgh office?
A. They were all subject to confirmation from the Pittsburgh office.

(Papers marked for identification respectively as Defendant's Exhibits Nos. 3 and 4.)

Q. I show you paper marked Defendant's Exhibit 3, and ask you what that paper is (indicating to witness)?
A. This is the confirmation of sale showing the terms and price and shipping instructions covering the order as we understood it.

Q. And as you understood it, you got the order from your agent in Philadelphia?

A. That is correct.

Q. Now, that sale was—the offer and acceptance of the sale, subject to your confirmation, was made in Philadelphia?

A. Correct.

Q. I show you Defendant's Exhibit No. 1, and ask you what that is (handing same to witness)?

A. That is the invoice covering the particular shipment, UTLX 33133, shipped August 1.

Q. And I show you Defendant Exhibit No. 4, and ask you what that is (handing same to witness)?

A. That is the bill of lading showing the consignment on the same car.

Q. The confirmation order has 3 car numbers stated on there—or 4 car numbers, and the invoice has but 1 car number, and the bill of lading has but 1 car number, will you explain why there are 4 car numbers on the confirmation order, and only 1 car number each on the invoice and bill of lading?

[fol. 30] A. The sales orders were very often made for a number of cars, and then the cars were listed on there as they were shipped out. This is one of the cars of this particular order.

Q. And the other cars were shipped later, were they?

A. That is correct.

Q. And would be shown under the invoices and the bill of lading, and were prepared to offer them in evidence, but not offered by reason of the stipulation?

(Papers marked for identification respectively as Defendant's Exhibits 5, 6 and 7.)

Q. Defendant's Exhibits 5, 6 and 7 constitute the confirmation order, the invoice and the bill of lading, showing transactions with the High Powered Gasoline Company and the Wiloil Corporation?

A. That is correct.

Mr. Christy: Now, if your Honors please, I desire to call your attention to the material parts of these—well, we offer —the defendant offers Defendants Exhibits 1, 2, 3, 5, 6 and 7 in evidence, and we desire to call your attention to the confirmation order as issued to Ace Oil Corporation by

Willock Oil Corporation as sale terms being f. o. b. Wilmington, Delaware, plus 3 cents tax. The invoice was issued to Ace Oil Corporation by Willock Oil Corporation, terms f. o. b. Wilmington, Delaware, showing the price of the gasoline, and also 3 cents tax. The bill of lading, Defendant's Exhibit 4, shows Willock Oil Corporation as the [fol. 31] shipper, Ace Oil Corporation, Philadelphia Pa., consignee route B. & O. Railroad—B. & O. and Reading Railroad—and provides that the Ace Oil Corporation, consignee, shall pay the freight. Now, all the other exhibits of the confirmation order——

Mr. Scott: I object to the last statement made by Mr. Christy, he said that the bill of lading provides that the Ace Oil shall pay the freight, I would prefer that the bill of lading speak for itself in that connection.

Mr. Christy: Well, I just wanted to so as to—explanatory as to what will develop later. Of course, the bill of lading and papers speak for themselves.

Q. And in every transaction you had there was a similar invoice, and similar bill of lading—a similar confirmation, similar bill of lading and a similar invoice?

A. That is correct.

Q. Why were these transactions shown in the confirmation, the invoice, and the bill of lading made f. o. b. Wilmington, Delaware?

A. In order that the purchaser would assume the freight charges and all risk of shipment.

Q. Why did you bill with the price of the gasoline the tax?

A. At that time we thought we were liable for the tax, and being a permit holder in Pennsylvania and the customer was not.

The Court (Judge Hargest): Was the tax paid to you?

A. How was that?

[fol. 32] The Court (Judge Hargest): Was the tax paid to you?

A. No, sir.

Q. In any of these transactions has the tax been paid to you by Ace Oil and High Powered?

A. Not any of the ones in question.

Q. Have you paid to the State of Pennsylvania taxes which you haven't collected from Ace Oil and High Powered?

A. Something like $6,000.

Q. That you haven't collected?

A. That is right.

Q. That you paid in advance of payment, or anticipated payment from these companies?

A. That is correct.

Q. Now, will you explain under what circumstances and how you came to understand that you weren't liable for this tax?

A. When the accounts became delinquent in the amount of about $28,000 we turned them over to our attorney for collection. And he at that time advised us that we were not liable for tax because the material was sold f. o. b. Wilmington, and the purchasers were the importers and not ourselves.

Mr. Scott: Well, I object to the last part of that answer, the last clause of it, I don't think is responsive.

The Court (Judge Hargest): Why? That is why he says he thinks he wasn't liable.

Mr. Scott: That is why the attorney thought he wasn't liable.

[fol. 33] Mr. Christy: That is a question for the Court.

Q. And in regard to the sales made for which you were later assessed by the State what advice were you given in connection with returning these sales to the Department?

A. We were advised to write a letter to the Department stating that these shipments were made, but that we were not liable for the tax.

Q. And did you do that?

A. Yes, sir.

Q. I show you a paper, Defendant's Exhibit 2, and ask you what that is——

Mr. Christy: Defendant offers Exhibit 4 also——

A. This is the letter dated October 3rd to the Department of Revenue, stating that these shipments had been made to Ace and High Powered, and that we were not——

Mr. Scott: Just a minute, is that the original letter, Mr. Hamilton?

A. This is a copy of the letter.

Mr. Christy: No, this is a copy.

Mr. Scott: Carbon copy. We can't find the original, I don't know whether we ever got it or not. May I see it?

Mr. Christy: If there is any objection, of course we will withdraw it.

(Witness hands letter to Mr. Scott.)

[fol. 34] Mr. Scott: Well, I have no objection to this because it obviously is a statement made after the report for the month of August was filed.

Mr. Christy: We will show differently, if you want to.

Mr. Scott: Go ahead, I have no objection to the introduction of that piece of paper.

Q. Now, was the original of that letter sent to the Department of Revenue?

A. Yes, sir.

Q. And when was that sent?

A. October 3, 1931.

Q. And was it sent in connection with the returns and at the same time the returns were made?

A. It was sent 3 days later than the return.

Q. That is, after the returns, but approximately at the time. And that is the letter that you sent in response to the advice you received from me?

A. That is correct.

Mr. Christy: Cross-examine.

Cross-examination.

By Mr. Scott:

Q. Mr. Hamilton, you said that this yellow—or that this letter, of which this is the carbon, was mailed to the Department on October 3rd?

A. Yes.

Q. And I believe you also said that your report for the month of August was mailed to the Department on September 30th?

A. Correct.

[fol. 35] Q. Which was the day upon which it should have been mailed, is that not correct?

A. Correct.

Q. Now, between the mailing of the report and the writing of that letter, as I understood you, you received advice from counsel to the effect that you were not liable for this tax to the Commonwealth, is that correct?

A. No, sir, we had received the advice before the report was filed.

Q. Well, you received that before the report was filed?

A. Correct.

Q. But you did not accompany this letter with the report, you didn't send the letter in with the report?

A. No, we did not.

Q. This was a supplement to the report however?

A. Yes, sir.

Q. Why didn't you report these cars—these 11 cars—in your August Report?

A. Because we were advised by our attorney we weren't liable for the tax.

Q. On those cars?

A. No.

Q. So you left them off altogether?

A. Uh, huh.

Q. You did, however, report other cars which were bought from the Crane Hook Company—I believe you said you got these cars from the Crane Hook Company?

A. Correct.

[fol. 36] Q. You did, however, report other cars that were bought from the Crane Hook Company on your report?

A. Yes, sir.

Mr. Christy: That is objected to, incompetent, irrelevant and immaterial.

The Court (Judge Hargest): Well, I don't see what that has to do with it. The other cars may have been bought under different conditions.

Mr. Scott: Well, I was endeavoring to show that they were bought under the same conditions.

The Court (Judge Hargest): Well.

Mr. Scott: That there is an inconsistency here in reporting them. I do not mean to say that there is any reflection upon the company by this inconsistency, but it has something to do with the intention of the company with regard to this particular sale.

The Court (Judge Hargest): Is there any claim of penalty here?

Mr. Scott: I beg your pardon.

The Court (Judge Hargest): Is there any claim of penalty here?

Mr. Scott: No, there is no claim of penalty.

The Court (Judge Hargest): Then it does not matter much; the legal question we are concerned with is not so much the intention.

[fol. 37] Mr. Scott: My view about intention was simply this, that intention might have a great deal to do with where this sale and delivery took place regardless of the papers that have been introduced in evidence.

The Court (Judge Hargest): Well, you may show that.

Mr. Scott: I beg your pardon.

The Court (Judge Hargest): If you can show that the papers do not speak the facts with reference to the sale, why that is another thing.

Mr. Scott: Well, I don't know whether I can show that or not, I want to go into that.

The Court (Judge Hargest): Well, go ahead then, all right. We will receive it subject to your objection.

Q. Mr. Hamilton you purchased other cars from the Crane Hook Company——

Mr. Christy: Your Honor note an exception?

The Court: No, our practice is to receive it subject to your objection and pass upon it afterwards.

Mr. Christy: All right.

Q. Mr. Hamilton, your company purchased other cars of gasoline in this same month of August from this same Crane Hook Company which were reported in your report?

[fol. 38] A. That is correct.

Q. Do you know to whom those cars were sold by your company? There are—well, you can examine them, of course, (handing papers to witness). There are—well, I see four of them on that schedule, and a great many more of them on—well, that is the same schedule—there is well over a dozen of them. Do you know to whom they were sold? Would these give you any information (referring to papers handed to witness)?

A. I couldn't tell without looking further in the records who the purchasers were.

Q. Well, for instance, here is Crane Hook Company, delivery New Castle. Would there be more than one customer of yours in New Castle?

A. Yes, we might have two or three.

Q. Well, do you have more than two or three?

A. We did at that time.

Q. How about Eisaman, Pa.?

Mr. Christy: A little louder.

Q. How about Eisaman, Pa., have you got——

A. Just one customer.

Q. Who is he?

A. Waverly Oil Works.

Q. Waverly Oil. Now, you reported a car that you bought from Crane Hook that you delivered to the Waverly Oil Works, is that not correct?

A. That is correct, they were permit holders.

Q. They were permit holders?

A. We did not have to collect the tax.

Q. You did not have to collect the tax on that, so you reported that. How about Beavertown, who is your customer in Beavertown?

[fol. 39] A. I don't remember that customer; there is one there for Berwyn.

Q. Berwyn?

Mr. Christy: If your Honor please, you can see plainly from the evidence if there is any mistake from the acts; I told them to show these cars to the Department by the letter—and the letter speaks for itself—which they did.

The Court (Judge Hargest): Do I understand you then to say that in the cases where you have purchased oil outside of the state, and where you sold oil then outside the state, the shipment into the state, and have reported them, they are all cases in which the purchasers were permit holders?

A. Not in all cases, no; no, we have reported it in all cases where we collected the tax.

The Court (Judge Fox): Well, in some cases you didn't collect the tax, you said, because they were permit holders?

A. Well, if our customer was a permit holder we naturally didn't have to collect it.

The Court (Judge Fox): Then you reported it?

A. We reported it.

The Court (Judge Fox): Then you reported it also in all cases where you actually collected the tax?

A. That is right.

The Court (Judge Fox): And in these cases you didn't [fol. 40] report it because you were advised you were not liable for these taxes?

A. That is right.

Mr. Christy: And we did inform the Department in that letter.

The Court (Judge Hargest): We understand the defendant's contention.

Q. Your customer in Berwyn, I believe, is the Mack Oil Company?

A. That is correct.

Q. And to make specific what you have just said you reported a sale to the Mack Oil Company, collected the tax on it, and paid tax over to the Commonwealth?

A. That is correct.

Q. That sale represented a purchase you made from the Crane Hook Company?

A. Yes, sir.

Q. Which car was shipped from Wilmington to Berwyn?

A. Yes, sir.

Q. Do you remember whether that was an f. o. b. shipment or not?

A. I don't recall.

Mr. Christy: A little louder, Mr. Hamilton, I don't think the Court can hear you; I can't.

The Court (Judge Fox): Well, now, was that before or after the advice from your counsel?

A. Have you the date of the shipment? (Witness refers to papers.) That was before the advice of counsel.

[fol. 41] The Court (Judge Fox): After all does it matter what their intentions were, if they are liable for the tax, no matter how *h*ishonest their intentions might have been not to pay it? They weren't liable no matter how dishonest——

Mr. Scott: Well, there is no question of dishonesty, I want to say it right here, there is no question at all of dishonesty in this case. But I do think that intention can be distinguished from legal mistake. I think that they intended to make a delivery when they turned this stuff over

to Ace Oil, and I think they intended that delivery in Pennsylvania, and I think that point is very significant.

The Court (Judge Hargest): Well, then, limit it to that point.

Mr. Scott: Well, I was trying to go into the other angles of it, but I will drop that line.

Q. Now, Mr. Hamilton, you say these sales to both Ace Oil and High Powered were made through Mr. Dietrich, your agent in Philadelphia?

A. That is correct.

Q. Confirmed by the home office?

A. Yes, sir.

Q. Confirmation issued of that?

A. Yes, sir.

Q. I believe you have said that the sales orders were often made for a number of cases—in explaining one of those confirmations I believe you said that there were 4 orders on there?

[fol. 42] A. The sales order was made for maybe 5—10 cars at a time, and then as the shipments went out they were listed on the sales order.

Q. Were those—well, now take this case here, they were for four cars, is that correct?

A. Yes.

Q. That order was for four cars?

A. Well, it was really for 10 cars.

Q. For 10 cars?

A. Yes.

Q. That confirmation only covered 4 cars—oh, I see, you have got some on the back?

A. There was nine cars shipped out of ten.

Q. Was Mr. Dietrich's arrangement with the Ace Oil that all cars should be sent as soon as possible?

A. I believe at the rate of 1 car a day.

Q. The arrangement then was—well, was it 1 car a day or was it when required?

A. They ordered the cars out daily as they wanted them.

Q. You had a contract to sell them 10 cars, and when they wanted them they asked you for them, is that the idea?

A. That is right.

Q. And that averaged about a car a day?

A. That is right.

Q. Is that what you mean to tell me?

A. That is correct.

Q. But the arrangement was that they should call upon you when they wanted them?

A. That is right.

[fol. 43] Q. And the contract was for the sale of the 10 cars?

A. That is right.

Q. And you were the consignor of these cars from Wilmington?

A. Consignor, yes, sir.

Q. You were not the consignee?

A. No, sir.

Q. And the 2 companies mentioned were the consignees?

A. That is correct.

Q. Were the bills of lading sent to the consignee?

A. The bills of lading in this case were retained by the Crane Hook Oil Storage at Wilmington in their files.

Q. How did the bills get into possession of the consignee —or how did the consignee get the release of the cars without the original or copy of the bill of lading?

A. The railroads make it a practice of delivering tank cars to people with private sidings without bills of lading.

Q. Without bills of lading? And that was true in all these cases?

A. Yes, sir.

Q. In other words, the railroad would make this delivery without any presentation of the bill of lading?

A. That is correct.

Q. And the Crane Hook would retain the bill of lading?

A. They did in this case.

[fol. 44] Q. But the Crane Hook was not the consignor?

A. No.

Q. You were the consignor?

A. They acted as our agent.

Q. Well, that is just what I wanted to ask you. You said that these cars were sent f. o. b. so that the purchaser would assume the freight. Mr. Hamilton, isn't it the practice in your business to sell gasoline f. o. b. certain places? In other words isn't that the way you fix the price on the gasoline?

A. Sure, the price is set f. o. b. certain point, either destination or point of shipment.

Q. I understand, but isn't it usual in your business to have it free on board at the point of shipment?

A. We try to make it a practice of making it f. o. b. shipping point where possible.

Q. And isn't that the way you fix the price on the gasoline?

A. Yes, sir.

Q. And the purchaser when he is buying the gasoline has to take that into consideration?

A. Yes, sir.

Q. Just as when I buy an automobile I take into consideration a similar custom in the automobile trade, isn't that correct?

A. The same thing.

The Court (Judge Fox): Who paid the freight on these particular cars?

A. Our customers.

Q. Did they pay that upon delivery?

[fol. 45] A. Yes, sir.

Q. Mr. Hamilton, just to straighten out the record, all of the transactions—there were 13 transactions that I had reference to in my direct examination—all of these transactions were the subject of exactly similar papers to this?

A. Correct.

Mr. Christy: Were what?

Q. Were the subject of exactly similar documents to this, this is a copy of the bill you sent to the Ace Oil?

A. That is correct.

Mr. Scott: I might state here that I have no objection to the introduction of the copy in place of the original.

Q. Mr. Hamilton, you now explain this inclusion of tax in the invoice for August as a mistake, is that as I understand it? You were advised by counsel that your legal liability was not for the tax, and you now say that it was included in the invoice for August by mistake?

A. That is right.

Q. Was it so included in the invoice for the car in October after you had received advice of counsel?

A. Well, I guess we could hardly say that, but we tried to collect the tax and couldn't, and so——

Mr. Scott: I see. That is all.

[fol. 46] Redirect examination.

By Mr. Christy:

Q. Mr. Hamilton, when did you receive the bills of lading that have been offered in evidence?

A. We believe we wrote for them about two or three months ago and Crane Hook sent them to us at that time.

Q. And for what purpose did you write for them?

A. Under the advice of our attorney to get them.

Q. To be used in this trial——

A. That is right.

Q. —Is that your reason? What was the first time that you knew the bills of lading were returned by Crane Hook Company—or were retained by Crane Hook Company at Wilmington, Delaware?

A. Well, that was the first that we knew they were——

Q. Why did you write to Crane Hook Company?

A. We first wrote to the customer and they said they didn't have them, and then we wrote to Crane Hook and asked them if they had them in their files.

Q. But you never retained the bills of lading?

A. Not in our files.

Q. And never knew that they were retained by Crane Hook Company until you wrote for them in the preparation of this trial?

A. That is correct.

Mr. Christy: That is all.

[fol. 47] Recross-examination.

By Mr. Scott:

Q. Never had these bills in Pittsburgh, before they were sent in, well, 2 months—within the last 2 months?

A. That is right.

Q. None of these bills of lading?

A. No.

Q. How about the copies of them?

A. Didn't even have a copy.

Mr. Scott: That is all.

Mr. Christy: The defendant rests.

The Court (Judge Hargest): Have you any rebuttal?

Mr. Scott: I believe not, Your Honor.

Mr. Christy: I have briefs here, if Your Honor cares to have them now?

The Court (Judge Hargest): Do you want to make an oral argument in this case?

Mr. Scott: I prefer, I don't know what Mr. Christy wants.

Mr. Christy: I prefer now.

Mr. Scott: I would prefer to file a brief at some later time, because, as Your Honor appreciates, this case was one that the story had to come from the other side. We [fol. 48] get half the picture from our auditors, we can't get any more.

The Court (Judge Hargest): Well, you have got the story.

Mr. Scott: Well, you have got the story now.

The Court (Judge Hargest): File the brief within 10 days, unless you want to make especially an orgal argument.

Mr. Christy: Well, it will only take me about 10 minutes.

The Court (Judge Hargest): You have the authorities on your brief?

Mr. Christy: I have the authorities on the brief.

Testimony closed.

(Argument.)

[fol. 49] DEFENDANT'S EXHIBIT No. 1

Willock Oil Corporation, First National Bank Building, Pittsburgh, Pa.

Sold to: Ace Oil Corp., City Center Bldg., Philadelphia, Pa.
Shipped to: Same.
Car No.: UTLX 33133.
Shipped from: Wilmington, Del.
Routing: Reading R. R.
Date: August 1, 1931.
Invoice No.: A-7157.
Our Order No.: 6262.
Your Order No.: —.
Terms: 45 Day F. T. A.
F. O. B.: Wilmington, Del.
Salesman: Mr. Dietrick.

Description	Quantity	Price	Amount
1 T/C "Wilgo" Anti-Knock Gasoline	10058	5½¢	528.05
Plus Tax, 10058 gals., 3¢			301.74
		Unpaid	829.79

Capacity	10207
Pump. 94	149
	10058

Discount of $— allowed if paid on or before ——, otherwise invoice is net.

Aug. 8, 1931.

No allowance will be made, or claim of any kind adjusted after car as been unloaded.

A rental of $2.00 per day will be assessed on all cars held over forty-eight hours.

[fol. 50] DEFENDANT'S EXHIBIT No. 2

(In Pencil: "Penna. Gasoline Tax)

October 3, 1931.

Department of Revenue, Bureau of Liquid Fuels Tax, Harrisburg, Pa.

GENTLEMEN:

Supplementing our statement for August 1931 covering sales of gasoline to distributors who do not have permits, we desire to advise that during the month of August we shipped to the Ace Oil Corporation of Philadelphia a total of 91,216 gallons of gasoline, which was sold to them, however, f. o. b. Wilmington, Delaware, and title passed at that point, which was our reason for not reporting this gallonage or paying the tax on same, as we feel the responsibility rests with them.

Also during the month of August we shipped to the High Powered Gasoline Company of Philadelphia 20,129 gallons of gasoline which was not reported or tax paid for same reasons as stated above.

Yours very truly, Willock Oil Corporation. ——, Secretary.

SMH:LM.

Ex.3.

WILLOCK OIL CORPORATION

SOLD TO: Ace Oil Corporation, City Center Bldg., Philadelphia, Pa.

Date: August 1, 1931.

SALES ORDER No. 6262

Confirming: MID-6 copies - [illegible]

Orders are accepted contingent upon strikes, fires, accidents, delays by carriers or causes beyond our control.

COMMODITY: "Wilgo" Anti-Knock Gasoline

QUANTITY: 10 T/Cts. Per telegram of 65 ninety-five l.t.n.

PRICE: [illegible] gal. f.o.b. Wilmington, Del. plus 3¢ tax

SHIPMENT: As ordered

TERMS: 45 dn. P.T.A.

INSTRUCTIONS:

Ship to: [illegible]

Shipping Point: [illegible]

Route: Reading RR

REMARKS:

Date	Car No.	Net Gallons	Amount	Weight	Rate	Freight	Net Amount	
8/1/31	[illegible]-33433	10058	528.05	Ship'd 10058 gal. @3¢			528.05 301.74 829.79	Shipped R.
8/4/31	"-27440	10103	530.41	Ship'd 10103 gal. @3¢			530.41 303.09 833.50	"
8/4/31	"-2253	10096	530.04	Ship'd 10096 gal. @3¢			530.04 302.88 832.92	"
8/4/31	[illegible]-27411	10040	527.10	Ship'd 10040 gal. @3¢			527.10 301.20 828.30	"

Fwd

8/6/31	XXXF29642	10054	502.70		
				Plus Tax 10054 @ 3¢	502.70 Tile.. R 301.62 804.32
8/8/31	" 27490	10090	504.50		
				Plus Tax 10090 @ 3¢	504.60 302.76 807.20 "
8/10/31	PJX 1569	10550			
				Plus Tax 10550 @ 3¢	553.27 [illegible] 190.38 "
8/12/31	" 5465	10066			
				Plus Tax 10066 @ 3 ¢	551.47 301.98 830.45 "
8/14/31	XRLX 27475	10754			
				+ tax @ 3¢	533.35 [illegible] 551.12 "

Ex.4

3577

Uniform Straight Bill of Lading—Original—Not Negotiable.

Shipper's No. 1296

Agent's No.

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading,

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route or to the next carrier on the usual interline route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route or to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

From Willock Oil Corp.

By B&O Company At WILMINGTON, DEL. Aug. 1, 1941

(Mail or street address of consignee—For purposes of notification only.)

Consigned to Ace Oil Corp.

Destination Philadelphia State of Pa. County of

Route B. & O. - RDG

Delivering Carrier Car Initial UTLX Car No. 55155

No. PACKAGES	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
1	Tank car gasoline	67366		
	Seal - 3554			
	Inflammable placards applied			

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall not make delivery of this shipment without payment of freight and all other lawful charges.

Willock Oil Corp.

(Signature of consignor)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $

to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

This Bill of Lading is entered through Customs Port of Entry to

Subject to Section 10 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this order without payment of freight and all other lawful charges.

Shipper

Per

*If the shipper wishes the value of the property agreed to or declared by the shipper to be not exceeding

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

Willock Oil Corp. Shipper, Per [illegible]

Permanent post-office address of shipper, X Pittsburgh, Pa.

Agent, Per

CONTRACT TERMS AND CONDITIONS.

Sec. 2. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) When perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expenses of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property. If proper care of the same requires special expense, and should there be a balance, it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignee shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property, and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, and to the conditions contained in this bill of lading not inconsistent therewith or with this section.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be inoperative and without effect, and this bill of lading shall be enforceable according to its original tenor.

[fol. 54] IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

OPINION

By the COURT:

This case comes before the court upon an appeal from the action of the Board of Finance and Revenue refusing to review determinations of liquid fuels tax settled against the defendant by the Department of Revenue for the months of August, September and October, 1931.

It is stipulated by the deputy attorney general and counsel for the defendant that a trial by jury be dispensed with in the above stated case and that the same be submitted to the decision of the court to be heard and determined under the provisions of the Act of 22nd April 1874, P. L. 109. It is also agreed that the three appeals filed to the above numbers may be consolidated and tried together.

This case came on to be heard by the court *in banc* at which time testimony was taken, oral and documentary, from which we find the following—

Facts

1. The defendant, with principal offices in Pittsburgh, Pa., is a licensed distributor of liquid fuels under the act approved May 21, 1931, P. L. 149, known as the Liquid Fuels Tax Act.

2. On August 1, 1931, the defendant, through its agent, Mr. Dietrich, at Philadelphia, sold to Ace Oil Corporation of Philadelphia, ten tank cars of "Wilgo" anti-knock gasoline, plus tax, 10,058 gallons, at three cents; terms "45 Day F. T. A. f. o. b. Wilmington, Del.", which sale by Mr. Dietrich was confirmed by the defendant.

[fol. 55] 3. While the order in this case was for ten cars only one car a day was shipped to the purchaser, the arrangement being that the purchaser should call upon the defendant when they wanted these tank-car shipments.

4. On August 4, 1931, the defendant, through its agent, Mr. Dietrich, sold to High Powered Gasoline Company of Philadelphia, one T/C of "Wilgo" anti-knock gasoline, price 5½¢ per gallon, f. o. b. Wilmington, Del., plus 3¢ tax, terms 30 Da. F. T. A. to shipping point, Essington, Pa., which gasoline was shipped f. o. b. to the High Powered Gasoline Company the same day, to Essington, Pa.

5. It was stipulated that other shipments of liquid fuels sold by the defendant to the Ace Oil Corporation and High Powered Gasoline Company were similarly made and that it would not be necessary to offer proof thereof.

6. The liquid fuels sold by the defendant to Ace Oil Corporation and High Powered Gasoline Company were purchased by the defendant from the Crane Hook Company of Wilmington, Del., and were shipped to the consignee on order of the defendant.

7. Neither Ace Oil Corporation or High Powered Gasoline Company held Pennsylvania permits, under the Liquid Fuels Tax Act.

8. The clear intention of the parties was that the consignees were to receive delivery of the liquid fuels purchased by them at their respective places of business in Pennsylvania.

9. During the month of August, 1931, eleven cars of oil were admittedly sold and not included by the defendant in [fol. 56] its report of taxable gasoline sold and delivered.

10. These eleven cars contained 111,345 gallons of gasoline which resulted in the determination by the Department of Revenue of additional tax against the defendant for that month in the amount of $3340.35.

11. During the month of September, 1931, one car was sold and delivered and not reported as taxable. This car contained 8,078 gallons of gasoline and resulted in an additional determination of tax for September of $242.34.

12. In October, 1931, one car containing 10,234 gallons of gasoline was found to have been unreported although sold and delivered under the same circumstances, and for this month an additional determination of $307.02 tax was made.

13. The total additional tax determined against the defendant by the Department of Revenue amounted to $3898.71, which is the amount in controversy in this case.

14. An audit of the books of the defendant by the Department of Revenue showed that it, the defendant, had sales records in its Pittsburgh office covering the sale of all the cars mentioned above. These sales records indicated that

the gasoline has been sold by the defendant, a distributor of liquid fuels under the provisions of the liquid fuels tax act of 1931, P. L. 149, to purchasers in Pennsylvania.

[fol. 57] Question Involved

May the Commonwealth of Pennsylvania impose and collect liquid fuels tax from a resident of Pennsylvania who is the holder of a permit to operate as a distributor of liquid fuels, upon sale of liquid fuels made to other residents of Pennsylvania where the agreement of sale was entered into in Pennsylvania, but where the liquid fuels were subsequently acquired by the distributor outside of Pennsylvania and shipped from a point outside of Pennsylvania direct to the purchaser?

Discussion

We think the Act of 21st May 1931, P. L. 149, commonly known as "the liquid fuels tax act" is a revenue act and involves no question under the police power: Knisely v. Cotterel; Wood v. Vare, 196 Pa. 614.

This act imposes a state tax payable by those defined in the act as distributors of liquid fuels used or sold and delivered within the commonwealth. The defendant in this case is, we think, a distributor, as provided in section 2 of the act, where "distributor" is defined, inter alia, as follows:

"* * * who * * *

"3. Imports or causes to be imported from any other state or territory of the United States liquid fuels for his own use in the Commonwealth of Pennsylvania, or for sale and delivery therein, after the same have *come to rest* (Italics are ours) or storage therein, whether or not in the original package, receptacle or container."

[fol. 58] The defendant is operating under a liquid fuels permit as provided in section 3, paragraph (b) of said act.

Section 4 of the act imposes a tax of three cents a gallon upon—

"all liquid fuels used or sold and delivered by distributors within this Commonwealth. * * *

"Distributors shall be liable to the Commonwealth as taxpayers for the payment of the tax imposed by this act."

Section 5 of the act provides:

"Every distributor using or delivering liquid fuels upon which a tax is imposed by this act shall pay the tax into the State Treasury, through the department, in the manner and within the time specified in this act; but whenever liquid fuels are delivered within the Commonwealth by one distributor to another distributor holding a permit under this act, the distributor receiving such liquid fuels shall separately show, in his monthly reports to the department, all such deliveries from each distributor, and shall pay the liquid fuels tax provided for by this act upon all such liquid fuels used or sold and delivered by him within this Commonwealth. The distributor making such deliveries shall separately show the same in his monthly reports to the department, and shall thereupon be exempt from the payment of the tax which would otherwise be imposed upon the liquid fuels so delivered. * * *

"Distributors may add the amount of the tax to the price of liquid fuels sold by them, and shall state the rate of the [fol. 59] tax separately from the price of the liquid fuels on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of liquid fuels."

The liquid fuels were sold by the defendant to Ace Oil Corporation and High Powered Gasoline Company, located in Pennsylvania. The consignees were not permit holders as required by the act, and therefore we think the tax was payable not by them but by the defendant who was a permit holder under the act.

The defendant contends that the delivery of the liquid fuels was made to the purchasers at Wilmington, Del., and therefore the sales were not consummated in Pennsylvania, but at the place named: Wilmington, Del. It is further contended by the defendant that the shipment of the liquid fuels from Wilmington, Del., to purchasers in Pennsylvania imposes a burden upon interstate commerce and therefore for these reasons the defendant cannot be required to pay the tax claimed by the Commonwealth. We will now proceed to examine these contentions to ascertain whether they are sound.

As this is a revenue act (Knisely v. Cotterel, supra), we think an examination of another similar revenue act will be enlightening. The Act of 2nd May 1899, P. L. 184, is

entitled: "An Act to provide revenue by imposing a mercantile license tax on venders of or dealers in goods, wares and merchandise, and providing for the collection of said tax."

The said Act of 1899 imposed a license tax of $2.00 on each retail vendor of or retail dealer in goods, wares and [fol. 60] merchandise, "and all persons so engaged shall pay one mill additional on each dollar of the whole volume, gross, of business transacted annually." Said act also imposed a similar tax upon wholesale vendors and dealers, and upon dealers and vendors of goods, wares and merchandise in any exchange or board of trade. The act provides a complete system of taxation for revenue, and includes the appointment of mercantile appraisers and fixing their qualifications; requires the auditor general to prepare blanks, how said blanks shall be filled up and returned to appraisers; fixes a penalty for those who refuse to fill said blanks, authorizes the county treasurer to settle and account for the amount of the tax due, and other provisions for the collection of said mercantile license tax and fixing penalties to be imposed upon persons who fail or refuse to comply with the provisions thereof. This act in so many particulars is similar to the liquid fuels tax act that we think decisions of our Supreme and Superior Courts in interpretation thereof are applicable. For example:

It was held in Knisely v. Cotterel, supra, that the said Act of 1899 was constitutional; that it was an act to provide revenue; that it was a tax on the defendant's property estimated by the volume of his annual sales: Williamsport v. Wenner, 172 Pa. 173; that it certainly was not a tax on the merchant's property generally for it need not appear whether he owns any property or not. We think this decision is applicable to the instant case. Applying what was said in the Cotterel case to the instant case, it clearly appears that the liquid fuels tax act is an act to provide reve-[fol. 61] nue; that it is a tax on the defendant's property estimated by the volume of its monthly sales; and that it was not a tax on the defendant's property generally for it need not appear whether said corporation owns any property or not.

This act (1899) was under consideration in the very late case of Baer's Appeal, 82 Pa. Superior Ct. 414, in which it was held:

"A dealer in lumber who has lumber shipped to him from other states and sells it in Pennsylvania is liable for the mercantile tax, imposed pursuant to the Act of May 2, 1899, P. L. 184, on sales made in Pennsylvania.

"The tax is determined upon the sales made in Pennsylvania and not on the purchases made without the state. The fact that the lumber was purchased outside of Pennsylvania does not render the business conducted by the dealer in Pennsylvania interstate commerce and, therefore, exempt from the Pennsylvania tax."

It appears from the opinion of Judge Linn that the appellant was a wholesale lumber dealer in Reading, Pa., where he resided and maintained his place of business. He dealt in lumber shipped from other states to this, in lumber that never came into the state, and in lumber that was never out of the state. We quote from Judge Linn's opinion, page 416:

"* * * This suit is concerned only with transactions of the first class. * * * He never had any unsold lumber on hand in the state. As principal, he solicited orders in the state, and when he obtained any, filled them by purchasing from dealers in other states, who, by his order, [fol. 62] *shipped direct to his vendees in Pennsylvania* (Italics are ours). He paid his vendors and his vendees paid him; there was no legal relation between his vendors and his vendees. See Com. v. Thorne, 70 Pa. Superior Ct. 599.

"His contention now is that he never had the lumber represented by that sum in the state, because he sold it to his vendees before it came in; that it moved in interstate commerce and was therefore beyond the state's power to tax. He was not taxed on or according to his purchase made in some other state, but by his sales here for delivery to vendees in this state. The tax was on his mercantile business of selling (Knisely v. Cotterel, 196 Pa. 614, 628, 630), measured by volume, conducted here where he resided. That he was engaged in interstate commerce in buying out of the state the thing wanted to complete his sale by delivery here, was merely incidental. 'But a tax that only indirectly affects the profits or returns from such commerce is not within the rule' prohibiting the tax: U. S. Glue Co. v. Oak Creek, 247 U. S. 321, 326, 328. As soon as

the lumber came into this state, it might have been taxed, though brought in for delivery by him on his sales here: Sonneborn Bros. v. Cureton, 262 U. S. 506, 516; then certainly the proceeds may be used as a tax base."

We think the ruling of the Superior Court in the case from which we have just quoted applied to the instant case. [fol. 63] The Act of 1899 as well as the Act of 1931, under consideration, are revenue acts for the reasons stated in the opinion to which we have referred in Knisely v. Cotterel, supra. Applying then this well established principle of law as pronounced in the interpretation of the Act of 1899, to the instant case, the sale of the liquid fuels was made to the purchaser in Philadelphia by Dietrich, the agent of the defendant; the sale was confirmed by the defendant in Pittsburgh; the liquid fuels were purchased from the Crane Hook Company of Wilmington, Del., shipped to the purchasers in Pennsylvania where it "came to rest" in the State of Pennsylvania: Banker Bros. v. Pennsylvania, 222 U. S. 210, 213 (reference hereto more at length will be made hereafter).

True, the gasoline was shipped f. o. b. Wilmington, Del., but it was conceded at the hearing by the treasurer of defendant company that the purpose of so shipping was to require the consignees to pay the freight. When a shipment is meant to be f. o. b. it does not conclusively mean the passage of title at that place, and, in fact, where the sale is of unascertained goods the shipping directions have no significance in determining the place of passage of title and delivery. The contract was executory, as we shall hereafter show: Frank Pure Food Co. v. Dodson, 281 Pa. 125. In Dannemiller v. Kirkpatrick, 201 Pa. 218, 223, it was held:

"* * * To 'bill' coffee f. o. b. Pittsburgh is not synonymous with the expression to 'deliver' coffee f. o. b. Pittsburgh. The language used in the agreement implied that the cost of the coffee at Pittsburgh, including the expense of placing it there, should not exceed the price of coffee [fol. 64] sold by firms competing with the plaintiffs at Pittsburgh."

See also Blakiston v. Davies, Turner & Co., 42 Pa. Superior Ct. 390, 394, where Dannemiller v. Kirkpatrick,

supra, was under discussion. It was said by President Judge Rice, writing the opinion of the Superior Court, page 394, as follows:

"* * * This doctrine is relied on by appellee's counsel but it should be noted that the same case is authority for the proposition, that if it is the intention of the parties, and it so appears from the contract, that delivery is to take place at the destination of the property, and that the title is to remain in the consignor until that time, then delivery to the carrier does not divest the title of the vendor to the property, nor pass it to the purchaser, until it reaches its destination, and the hazards of transportation are at the risk of the consignor."

In the instant case there is no question but that the "bill" rather than the "delivery" was f. o. b. Wilmington, Del.

In the bill rendered to the consignees for the liquid fuels thus shipped, dated August 1, 1931, the tax required to be paid by the liquid fuels tax act was added to the bill as required by the act (see record p. 39). The contention of the defendant now is that this was done in ignorance of the interpretation afterwards placed upon the act by its attorney; but it appears they included the tax in their bill after the advice of the attorney was given. In any event we think they were in duty bound, under the provisions of [fol. 65] the act, to include the tax as a part of the bill rendered to the consignees for the liquid fuels purchased by them.

Furthermore, we are of opinion that the contract between the defendant, the consignor of this gasoline, and the purchasers, who were the consignees, was executory; that is to say, it was a contract to sell and deliver to the consignees in Pennsylvania certain quantities of liquid fuels. It does not appear anywhere in the evidence that the defendant, at the time the contract of sale was made, was the owner of any liquid fuels, nor does it appear that the consignees agreed *to accept delivery of said liquid fuels at Wilmington, Del.* It seems to us that the correct interpretation of the contract is that the liquid fuels purchased were to be delivered to the consignees in Pennsylvania where the consignment "came to rest". It does appear from the evidence, however, that after the contract for the

purchase and delivery of the liquid fuels was made by the purchasers from the defendant corporation, it, the defendant corporation, purchased the liquid fuels at Wilmington, Del., and directed it to be shipped to the consignees in Pennsylvania f. o. b.

As stated by Mr. Justice Walling in Frank Pure Food Co. v. Dodson, supra, 127—

"* * * The contract was executory; in other words, it was not a purchase of existing specific property, but an agreement to purchase unascertained and nonexistent goods, to be thereafter produced; the case, therefore, falls within Rule 4, clause 1, of section 19, of the Sales Act of May 19, 1915, P. L. 543, 548, that: 'Where there is a con- [fol. 66] tract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.' Thereunder, in the case of future goods, the title does not pass until they are ascertained and set aside by the act or consent of both parties. * * * *To pass title, the seller's appropriation of the goods must* be assented to by the buyer (Italics are ours): Uniform Laws Annot-ed, vol. 1, Sales Act, p. 102; Funt v. Schiffman, 187 N. Y. S. 666, Byrne v. Hylett Motor Car Co., Inc., 198 N. Y. S. 232, Jaehnig & Peoples, Inc., v. Fried, 83 N. J. L. 361, 85 Atl. 321. * * *"

As we have before stated, there is no evidence that at the time the sale was made or at any future time, the purchasers agreed to accept delivery of the liquid fuels so purchased at Wilmington, Del., but on the contrary the assumption is that they purchased the liquid fuels to be delivered to them in the State of Pennsylvania in tank car lots. We cannot find, therefore, that the delivery of the liquid fuels in question in the instant case was made to the purchasers at Wilmington, Del., but we have found as a fact that the clear intention of the parties gathered from the evidence, documentary and otherwise, was that the consignees were to receive delivery of the liquid fuels purchased by them at their respective places of business in Pennsylvania.

[fol. 67] We do not find anything in Bishop C. Perkins & Co. v. Standard Sugar & Supply Co., 70 P. L. J. 349, Smith Co. Ltd. v. Marano, 267 Pa. 107, Perkins v. Halpren, et al., 257 Pa. 402, and Greene County for use v. Southern Surety Co., 292 Pa. 304, strongly relied upon by counsel for the defendant, which in any way alters our opinion hereinbefore stated.

Bishop Perkins & Co. v. Standard Sugar & Supply Co., supra, was not similar in the facts which Judge Ford had before him to the facts in the instant case. In that case the order was not delivered and payment was refused for reasons expressed in the opinion. Held, that the plaintiff was not responsible for the carrier's failure to deliver the goods. Further comment on this case seems unnecessary.

Smith Co. Ltd. v. Marano, supra, defines the meaning of the letters "C. I. F.", and when used in connection with commercial quotations, signify that the price to be paid for goods will include al charges to the port of destination; and decides that if the goods are lost at sea it is the buyer's loss and he must pay for them. Held further, that in case of failure to deliver the goods shipped at sea C. I. F. the buyer cannot assert that, under rule 5, section 19, of the Pennsylvania Sales Act of May 19, 1915, P. L. 543, the goods were never delivered to him. If the price had not included insurance, such a claim might well be urged, but reading the contract as a whole, as it must be read with the item for insurance included in it, a "different intention" on the part of the buyer is disclosed from that contemplated by rule 5. Certainly this is the law but it is [fol. 68] not applicable to the instant case because the facts are different.

An entirely different state of facts appears in Perkins v. Halpren, supra. Therein it is held that whether or not title passed to defendants in this specific instance depends upon the intention of the parties as indicated by the course of dealing with each other. See opinion of Mr. Justice Frazer, page 407. A careful reading of this case clearly shows it is not applicable to the facts in the instant case. It involved the question of a guarantee by a bank that the purchaser would pay for the goods which were placed in a storage house; it was agreed that the purchaser might sell the goods, the money to be paid to this bank. The

bank accepted the drafts, and charged the amount thereof to the plaintiff's account and plaintiff gave a trust receipt whereby he agreed to hold the merchandise in trust as the property of the bank with liberty to sell the same for the account of the bank and deliver the proceeds to the bank to be applied against the acceptance of the draft. Subsequently the plaintiff assigned his claim against the defendant for the unpaid balance of the price for value to the Bank of Commerce of which defendants had notice. How do these facts apply to the instant case? To ask this question is to answer it.

In support of defendant's contention that the state is not a party to this contract and therefore cannot maintain an action for the tax imposed by the liquid fuels tax act we are referred to Greene County v. Southern Surety Co., supra, which holds that where a person not a party to a contract attempts to bring an action on it, he must show [fol. 69] that the contract was made for his benefit; the question then arises as to whether the law permits him to enforce the contract by a direct action at law. What application this case has to the instant case where the Commonwealth seeks to recover a tax imposed by the Liquid Fuels Tax Act we cannot comprehend.

We think the instant case does not involve the question of interstate commerce transactions for the reasons expressed in Baer's Appeal, supra; also Banker Bros. v. Pennsylvania, supra, where it was held where the transaction of sale of an article manufactured in another state is wholly intrastate, as between vendor and vendee, it does not become interstate and immune from state taxation because the purchaser pays freight from the place of manufacture or because the purchaser obtains a warranty direct from the manufacturer. And in Sonneborn Bros. v. Cureton, 262 U. S. 506, it was held as regards immunity from state taxation, the distinction between imports and articles in original packages in interstate commerce, is that, in the one case, the immunity attaches to the import itself before sale, while, in the other, it depends on whether the tax regulates or burdens interstate commerce. See opinion of Chief Justice Taft, page 516, in which he says:

"A state tax upon merchandise brought in from another State or upon its sales, whether in original packages or not, after it has reached its destination and is in a *state of rest*

(Italics are ours), is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another state."

[fol. 70] We think the instant case cannot be distinguished from that of Banker Brothers v. Pennsylvania. Banker Brothers was a corporation doing business in Pittsburgh as retail vendors of automobiles to purchasers in Pennsylvania. The sales were in fact made before Banker Brothers acquired title to the automobiles and were made upon the condition that the purchasers pay the list price of the automobiles f.o.b. factory. The factory in question was the George N. Pierce Company engaged in business in Buffalo, N. Y., and after sale was made by Banker Brothers the automobile was procured from the maker, the purchaser paying the list price and the freight from Buffalo. Banker Brothers were not the agents of the manufacturers but were engaged in business on their own account. The court held that they were liable to pay the mercantile license tax of Pennsylvania, which was based upon the gross sales of Banker Brothers to persons in Pennsylvania, on the ground that such sales were not transactions in interstate commerce. It was also held:

"* * * The fact that he (the purchaser) was liable for the freight by virtue of the agreement to 'pay the list price f.o.b. factory' did not convert it into a sale by the manufacturer at the factory; neither was that result accomplished because, with the machine Banker Brothers Company also delivered to the buyer in Pittsburgh a warranty from the manufacturer direct.

"These were mere incidents of the intrastate contract of sale between Banker Brothers Company and the pur-[fol. 71] chaser in Pittsburgh, who was not concerned with the question as to how the machine was acquired by his vendor, or whether that company bought it from another dealer in the same city, or from the manufacturer in New York. The contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price. See American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; American Exp. Co. v. Iowa, 196 U. S. 146, 49 L. ed. 423, 25 Sup. Ct. Rep. 182. The court

properly held it was not an interstate transaction but taxable under the laws of Pennsylvania."

Following the case of Banker Bros. v. Pennsylvania, supra, and Baer's Appeal, supra, we are of the opinion that the instant case does not involve a burden upon interstate commerce; that the sale and delivery was made in Pennsylvania; and that the defendant is liable for the liquid fuels tax provided in the liquid fuels tax act. The appeals are dismissed and the determinations of the Department of Revenue are sustained.

Conclusions of Law

1. The sale and delivery of the liquid fuels in question were made and delivered to the purchasers in Pennsylvania where the liquid fuels so purchased "came to rest".

2. The interstate commerce law is not involved in the instant case.

3. The defendant is liable to pay the tax determined [fol. 72] against it by the Department of Revenue under the Liquid Fuels Tax Act of 1931.

4. The costs of these proceedings are to be paid by the defendant.

(S.) Frank B. Wickersham, A. L. Judge for the Court in Banc.

In Court of Common Pleas of Dauphin County

Order Directing Entry of Judgment

The Prothonotary is directed to enter judgment upon the determination of the Department of Revenue in Commonwealth Docket 1932, as follows:

No. 356, Tax	$3,340.35	
Interest at 1% per month from October 1, 1931, to March 16, 1933	601.26	$3,941.61

No. 357, Tax	$242.34	
Interest at 1% per month from November 1, 1931, to March 16, 1933	41.20	$283.54
No. 358, Tax	$307.02	
Interest at 1% per month from December 1, 1931, to March 16, 1933	49.12	$356.14

Inasmuch as a grave constitutional question has been raised by the defendant we think it unfair and inequitable to add the ten per cent, penalty to the judgment, as required by the act.

(S.) Frank B. Wickersham, A. L. Judge for the Court in Banc.

[fol. 73] NOTE: Appellant, Wiloil Corporation, filed exceptions to the findings of fact and conclusions of law of the Common Pleas Court of Dauphin County, Pa., in accordance with the State practice.

[fol. 74] IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

OPINION ON EXCEPTIONS

By the COURT:

In our opinion filed in these cases and reported in 37 Dauphin County Reporter, page 63, we inadvertently neglected to state, in directing judgments to be entered for the commonwealth, the words "unless exceptions are filed hereto within the time allowed by law" (see page 75), and our opinion is corrected to read: "The Prothonotary is directed to enter judgments in Nos. 356, 357 and 358 Commonwealth Docket, 1932, unless exceptions are filed hereto within the time provided by law."

The judgments directed to be entered were, in our opinion, the verdicts which we were required to enter as pro-

vided in section 2 of the Act of April 22, 1874, P. L. 109. Exceptions having been filed to our findings of fact and conclusions of law, we will now proceed to final judgment in the case: Hoover, et al. v. Pontz, 271 Pa. 285.

We do not understand the request of counsel for the defendant that we find additional facts. This, we think, cannot be done. Let us assume that these cases were tried before a jury; the plaintiff and defendant could at the conclusion of the trial have requested that we instruct the jury upon certain questions of law and fact. Could it be contended that after the verdict was rendered by the jury coun- [fol. 75] sel for the defendant could ask for additional instructions? To ask this question is to answer it. The instant cases were tried by the court without a jury under the Act of 1874, above mentioned. The cases were argued at length before the three Judges of this court. No requests for findings of fact or conclusions of law were presented to the court for its consideration by either the attorney general or counsel for the defendant. After carefully considering the evidence we found the facts which we considered were supported by the great weight of the evidence and after a more or less lengthy discussion, reached our conclusions of law and directed judgments to be entered unless exceptions were filed. How then can it now be argued that we find additional facts presenting a case at variance with the conclusions which we have reached? The opinion which we heretofore filed had the unqualified approval of the three Judges of this court.

Considering the requests for additional findings of fact as exceptions, and having in mind all the exceptions filed by counsel for the defendant, we think they cannot be sustained. We allowed counsel to argue his exceptions at great length, but we find nothing in the exceptions or the argument which present a different case to us than that which we had before us at the original argument prior to filing our first opinion, or which would lead us to a different conclusion from our first opinion.

And now, May 15, 1933, it is ordered, adjudged and decreed that the exceptions to the findings of fact and conclusions of law entered by us are all overruled, and judg- [fol. 76] ments are directed to be entered in favor of the commonwealth and against the defendant as indicated in our former opinion.

(Signed) Frank Wickersham, A. L Judge.

In Court of Common Pleas of Dauphin County

Judgment

Same day judgment in favor of the Commonwealth of Pennsylvania and against the Defendant in the sum of $3941.61 pursuant to opinion heretofore filed.

Arthur H. Bailey, Prothonotary.

Stenographer's certificate to foregoing transcript omitted in printing.

In Court of Common Pleas of Dauphin County

Order Approving Record

The foregoing record of the proceedings upon the hearings of the above cause is hereby approved and directed to be filed.

Frank B. Wickersham, Additional Law Judge.

[fol. 77] 244

In Supreme Court of Pennsylvania, Middle District

No. 4 May Term, 1934

Commonwealth of Pennsylvania

v.

Wiloil Corporation, Appellant

Appeal from judgment of Court of Common Pleas of Dauphin County, Commonwealth Docket, 1932, No. 356.

Opinion of the Court—Filed June 30, 1934

Schaffer, J.:

The inquiry to be pursued in this case is whether the Commonwealth may collect certain gasoline taxes from

appellant under the Liquid Fuels Tax Act of May 21, 1931, P. L. 149, 72 P. S. sec. 2611 (b).

Appellant is a Pennsylvania corporation with its principal office and place of business in this State. It is engaged in selling liquid fuels at wholesale, and is a permitholder under the provisions of the tax act. The Department of Revenue discovered that it had failed to report and pay tax upon certain cars of gasoline sold by it to the Ace Oil Corporation and the High Power Gasoline Company, both of Philadelphia. All of the gasoline was sold by appellant's agent in Philadelphia to the two companies named. The sales were subject to and received the approval of appellant at its office in Pittsburgh. At the time the sales were made appellant did not possess the gasoline. To fill the orders taken by its agent appellant obtained the gasoline from the Crane Hook Company in Wilmington, Delaware. Shipments were made direct from Wilmington to the purchasers in Philadelphia or Essington, Pennsylvania. In each instance the car containing the gasoline moved under a bill of lading showing appellant as consignor and either one or the other of the two purchasing concerns as consignee. The place of shipment was indicated as Wilmington, and of destination as Philadelphia, or Essington, consignee's private sidings. Freight was not [fol. 78] prepaid and the consignee paid it. The invoices made out by appellant and sent to the consignees state that the shipments were made f. o. b. Wilmington, and they include in the price to be paid the tax on the gasoline.

Appellant contends that the tax was added by it to the invoice in ignorance of a proper understanding of the law. However this may be, it appears that after appellant was advised by counsel that it was not liable to collect and pay over the tax to the Commonwealth, it continued to include the impost in subsequent invoices. Appellant has been unable to collect the tax, as both vendees are insolvent.

The first position assumed by appellant is that the title to the gasoline passed to the purchasers at Wilmington, Delaware, and that they were the importers under the terms of the act and alone liable for the tax. The second position taken is that, if the title did not pass at Wilmington, deliveries were made to the purchasers in Pennsylvania in tank cars, the original packages, that the ship-

ments were at all times in interstate commerce and the charging of the tax to the seller is illegal, as it imposes a burden upon such commerce, and that if that be the intent of the act, it is unconstitutional.

Taking up the first position, we find that the Sales Act of May 19, 1915, P. L. 543, sec. 18, 69 P. S. Sec. 142, recognizes that the intention of the buyer and the seller determines the time of the passage of title. For the purpose of ascertaining their intention, the act says regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

We start with the fact that the sale was actually made in Pennsylvania. The contention of appellant arises out of the circumstance that the price was fixed f. o. b. Wilmington. This, however, does not necessarily mean that title passed there, particularly is this so in view of the intention of the parties evidenced by the provision in their contract that the vendees should pay the tax to the vendors. [fol. 79] If the parties contemplated that the title passed at Wilmington, outside Pennsylvania, and the gasoline there belonged to the purchasers, it is difficult to understand how the seller could have regarded itself as in any way liable for a Pennsylvania tax. As we view it, the provision in the contract that the gasoline was to be f. o. b. Wilmington was not intended to designate the place of delivery, but to fix the full price to be paid. This is shown by plaintiff's invoice offered in evidence, which after setting forth the sale contains the following: "Price 5½¢ gal. f. o. b. Wilmington, Del., plus 3¢ tax." Furthermore, plaintiff's secretary and treasurer testified, in answer to the question whether it was not the practice in their business to sell gasoline f. o. b. certain places in order to fix the price, that it was, and that the purchaser when buying gasoline has to take this into consideration, just as the buyer of an automobile has to take into account when he is purchasing, the custom in that trade to name a price f. o. b. the place of manufacture. It is also apparent from the testimony of the secretary and treasurer that although the consignee was to pay the freight from Wilmington, this also was only as a matter of price, not of delivery. That f. o. b. a certain place may be merely price fixing was recognized in Dannemiller v. Kirkpatrick, 201 Pa. 218. See also Charles E. Hires Co. v. Stromeyer, 65 Pa. Superior Ct. 241, 243.

Where there is a sale of unascertained goods, the shipping directions do not determine the place of passage of title and delivery. The authorities holding that delivery to a common carrier is delivery to the vendee have no application here, because the intention of the parties, which is controlling on the question of delivery, shows that the title was not intended to pass until the goods reached their destination: Blakiston v. Davies, Turner & Co., 42 Pa. Superior Ct. 390, 394. In Frank Pure Food Co. v. Dodson, 281 Pa. 125, which was a case of an agreement to purchase unascertained and nonexisting goods, we said, page 127:

"The contract was executory; in other words, it was not a purchase of existing specific property, but an agreement [fol. 80] to purchase unascertained and non-existent goods, to be thereafter produced; the case therefore, falls within Rule 4, clause 1, of section 19, of the Sales Act of May 19, 1915, P. L. 543, 545. * * * Thereunder, in the case of future goods, the title does not pass until they are ascertained and set aside by the act or consent of both parties. * * * To pass the title, the seller's appropriation of the goods must be assented to by the buyer."

We now come to appellant's second position, which is that the levying of the tax puts a burden on interstate commerce. In Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290, the Supreme Court of the United States said, page 294: "While a state may not use its taxing power to regulate or burden interstate commerce * * * a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights." Both appellant and the purchasers conducted their business in Pennsylvania. The sale and delivery of the gasoline occurred in Philadelphia. The fact that appellant secured the gasoline in Wilmington for the purpose of performing its contract was incidental. It was not contemplated by the agreement of sale that the gasoline be procured in Wilmington or in any other particular place. The contract could have been as well performed had it been procured by appellant in Pennsylvania. Taxation of the sale or delivery of the gasoline by appellant to its purchasers, only remotely and indirectly affects interstate commerce.

The same situation was before the Supreme Court of the United States in Ware & Leland v. Mobile County, 209 U. S. 405. The court there said, page 413:

"When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one state to the place of delivery in another state. And though it is stipulated [fol. 81] that shipments were made from Alabama to the foreign state in some instances, that was not because of any contractual obligation so to do. In neither class of contracts, for sale or purchase, was there necessarily any movement of commodities in interstate traffic, because of the contracts made by the brokers. * * * The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."

An analogous situation to that now confronting us existed in Banker Brothers Co. v. Pennsylvania, 222 U. S. 210. Banker Brothers Company was a corp-ra*a*tion doing business in Pennsylvania as a retail vender of automobiles. Sales were in fact made by the company before it acquired title to the automobiles sold, and were made upon the condition that the purchaser pay the list price of the automobile f. o. b. factory, which was in Buffalo, New York. After a sale was made by Banker Brothers Company, the automobile was purchased by them from the factory, and their vendee paid to them the list price and the freight from Buffalo. The seller was not the agent of the manufacturer, but was engaged in business on its own account. The Commonwealth sued Banker Brothers Company to collect a mercantile license tax upon its gross sales to purchasers in Pennsylvania. The court held that such sales as that above outlined were not transactions in interstate commerce and that the tax was not an undue burden thereon, saying page 214:

"The fact that he [the purchaser] was liable for the freight by virtue of the agreement to 'pay the list price f. o. b. factory' did not convert it into a sale by the manu-

facturer at the factory; neither was that result accomplished because, with the machine, Banker Brothers Company also delivered to the buyer in Pittsburgh a warranty from the manufacturer direct. These were mere incidents of the intrastate contract of sale between Banker Brothers Company and the purchaser in Pittsburgh, who was not concerned with the question as to how the machine was ac-
[fol. 82] quired by his vendor, or whether that company bought it from another dealer in the same city or from the manufacturer in New York. The contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price. * * * The court properly held it was not an interstate transaction, but taxable under the laws of Pennsylvania."

In Baer's Appeal, 82 Pa. Superior Ct. 414, in which the opinion was written by Mr. Justice Linn, then a member of the Superior Court, the facts showed that Baer was a wholesale lumber dealer maintaining a place of business in Reading. He dealt in lumber shipped from other states into Pennsylvania. He claimed exemption from taxation on the ground that the transactions in which he was engaged and upon which the mercantile license tax was based, were in interstate commerce. He solicited orders in Pennsylvania and filled them by purchasing lumber from dealers in other states who, by his orders, shipped direct to the vendees in Pennsylvania. He paid his vendors and his vendees paid him. Holding that the tax was legally imposed and that it did not unduly burden interstate commerce, Judge Linn said, page 416: "He was not taxed on or according to his purchase made in some other state, but by his sales here for delivery to vendees in this state. The tax was on his mercantile business of selling, * * * measured by volume, conducted here where he resided. That he was engaged in interstate commerce in buying out of the state the thing wanted to complete his sale by delivery here, was merely incidental. 'But a tax that only indirectly affects the profits or returns from such commerce is not within the rule' prohibiting the tax: U. S. Glue Co. v. Oak Creek, 247 U. S. 321, 326, 328. As soon as the lumber came into this state, it might have been taxed, though brought in for delivery by him on his sales here:

Sonneborn Bros. v. Cureton, 262 U. S. 506, 516; then certainly the proceeds may be used as a tax base."

Appellant strongly relies upon Sonneborn Bros. v. Cureton, 262 U. S. 506. In that case, which apparently modified [fol. 83] many prior decisions, the seller himself was located in a different state from the purchaser and the contract of sale was made with the purchaser by an agent of the seller. The contract, therefore, clearly contemplated a shipment from the seller to the purchaser in interstate commerce. The movement in interstate commerce was not incidental but was intended by the parties to the contract of sale. In the instant case, as in the Banker Brothers Company case, the sellers were acting as independent principals, making contracts with purchasers in the same state, though they subsequently purchased the goods necessary to complete such contracts from persons in other states. In both cases the goods were shipped to the purchasers direct from the persons supplying them in other states, but such shipment was incidental.

In the recent case of Minnesota v. Blausius, 290 U. S. 1, 78 L. Ed. Adv. Ops. 19 (1933), the court speaking through Mr. Chief Justice Hughes said:

"But because there is a flow of interstate commerce which is subject to the regulating power of the Congress, it does not necessarily follow that, in the absence of a conflict with the exercise of that power, a state may not lay a nondiscriminatory tax upon property which, although connected with that flow as a general course of business, has come to rest and has acquired a situs within the state. • • • 'The question [that is, as to the validity of the state tax] it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power, in view of its nature and operation, must be deemed to be in conflict with this paramount authority.' "

In Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17, 78 L. Ed. Adv. Ops. 343 (1934), the Supreme Court said: "The mere extension of control over a business by the national government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy."

Without further travelling through the maze of the interstate commerce decisions, we are of opinion that the cases herein referred to establish that the gasoline in ques-
[fol. 84] tion, under the facts appearing, was sold and delivered by appellant in Pennsylvania, that such sale and delivery did not constitute a transaction in interstate commerce, and that therefore it was taxable.

The judgment is affirmed.

[fol. 85] NOTE: The petition of Wiloil Corporation (appellant) for reargument was duly filed with the State Supreme Court on July 12th, 1934.

"Order of Court

July 12th, 1934.—Upon consideration, a reargument is refused.

Per Curiam, F."

[fol. 86] IN SUPREME COURT OF PENNSYLVANIA

ASSIGNMENTS OF ERROR

First Assignment of Error

The Court below erred in overruling defendant's exception to the Court's 8th finding of fact, which finding is as follows (60 a):

"8. The clear intention of the parties was that the consignees were to receive delivery of the liquid fuels purchased by them at their respective places of business in Pennsylvania."

Defendant excepted as follows (78 a):

"1. Defendant excepts to the Court's eighth finding of fact, which finding is as follows:

'8. The clear intention of the parties was that the con-
[fol. 87] signees were to receive delivery of the liquid fuels purchased by them at their respective places of business in Pennsylvania.'

for the reason that said finding is contrary to the evidence."

The Court ruling is as follows (83 a):

"And now, May 15, 1933, it is ordered, adjudged and decreed that the exceptions to the findings of fact and conclusions of law entered by us are all overruled and judgments are directed to be entered in favor of the commonwealth and against the defendant as indicated in our former opinion.

Frank Wickersham, A. L. Judge."

Second Assignment of Error

The Court below erred in overruling defendant's exception to the Court's 14th finding of fact, which finding is as follows (61 a):

"14. An audit of the books of the defendant by the Department of Revenue showed that it, the defendant, had sales records in its Pittsburgh office covering the sale of all the cars mentioned above. These sales records indicated that the gasoline has been sold by the Defendant, a distributor of liquid fuels under the provisions of the liquid fuels tax act of 1931, P. L. 149, to purchasers in Pennsylvania."

Defendant excepted as follows (78 a):

"2. Defendant excepts to the Court's fourteenth finding [fol. 88] of fact, which finding is as follows:

'14. An audit of the books of the defendant by the Department of Revenue showed that it, the defendant, had sales records in its Pittsburgh office covering the sale of all the cars mentioned above. These sales records indicated that the gasoline has been sold by the defendant, a distributor of liquid fuels under the provisions of the liquid fuels tax act of 1931, P. L. 149, to purchasers in Pennsylvania.'

for the reason that the evidence conclusively shows that delivery of the goods sold was made to the purchasers outside of Pennsylvania and title passed to the purchasers at the time of delivery, and the purchasers were the ones who

brought the goods into Pennsylvania and were taxable under the Liquid Fuels Act of 1931, P. L. 149, and not the defendant."

The Court ruling is as follows (83 a):

"And now, May 15, 1933, it is ordered, adjudged and decreed that the exceptions to the findings of fact and conclusions of law entered by us are all overruled and judgments are directed to be entered in favor of the commonwealth and against the defendant as indicated in our former opinion.

Frank Wickersham, A. L. Judge."

[fol. 89] Third Assignment of Error

The Court below erred in overruling defendant's exception to the Court's first conclusion of law, which conclusion is as follows (76 a):

"1. The sale and delivery of the liquid fuels in question were made and delivered to the purchasers in Pennsylvania where the liquid fuels so purchased 'came to rest'."

Defendant's exception is as follows (81 a):

"1. Defendant excepts to the Court's first conclusion of law, which conclusion is as follows:

'1. The sale and delivery of the liquid fuels in question were made and delivered to the purchasers in Pennsylvania where the liquid fuels so purchased 'came to rest'."

The Court's ruling is as follows (83 a):

"And now, May 15, 1933, it is ordered, adjudged and decreed that the exceptions to the findings of fact and conclusions of law entered by us are all overruled, and judgments are directed to be entered in favor of the commonwealth and against the defendant as indicated in our former opinion.

Frank Wickersham, A. L. Judge."

Fourth Assignment of Error

The Court erred in overruling the defendant's exception to the Court's second conclusion of law, which conclusion is as follows (76 a):

[fol. 90] "2. The interstate commerce law is not involved in the instant case."

Defendant's exception is as follows (81 a):

"2. Defendant excepts to the Court's second conclusion of law, which conclusion is as follows:

'2. The interstate commerce law is not involved in the instant case.'"

The Court's ruling is as follows (83 a):

"And now, May 15, 1933, it is ordered, adjudged and decreed that the exceptions to the findings of fact and conclusions of law entered by us are all overruled, and judgments are directed to be entered in favor of the commonwealth and against the defendant as indicated in our former opinion.

Frank Wickersham, A. L. Judge."

Fifth Assignment of Error

The Court erred in overruling the defendant's exception to the Court's third conclusion of law, which conclusion is as follows (76 a):

"3. The defendant is liable to pay the tax determined against it by the Department of Revenue under the Liquid Fuels Tax Act of 1931."

Defendant's exception is as follows (81 a):

"3. The defendant excepts to the Court's third conclusion of law, which conclusion is as follows:

'3. The defendant is liable to pay the tax determined [fol. 91] against it by the Department of Revenue under the Liquid Fuels Tax Act of 1931'."

The Court's ruling is as follows (83 a):

"And now, May 15, 1933, it is ordered, adjudged and decreed that the exceptions to the findings of fact and conclusions of law entered by us are all overruled, and judgments are directed to be entered in favor of the commonwealth and against the defendant as indicated in our former opinion.

Frank Wickersham, A. L. Judge."

Sixth Assignment of Error

The Court erred in overruling the defendant's exception to the Court's fourth conclusion of law, which conclusion is as follows (77 a):

"4. The costs of these proceedings are to be paid by the defendant."

The defendant's exception is as follows (81 a):

"4. The defendant excepts to the Court's fourth conclusion of law, which conclusion is as follows:

'4. The costs of these proceedings are to be paid by the defendant'."

The Court's ruling is as follows (83 a):

"And now, May 15, 1933, it is ordered, adjudged and decreed that the exceptions to the findings of fact and conclusions of law entered by us are all overruled, and judgments are directed to be entered in favor of the common- [fol. 92] wealth and against the defendant as indicated in our former opinion.

Frank Wickersham, A. L. Judge."

Seventh Assignment of Error

The Court erred in overruling the defendant's exception to the Court directing judgment to be entered against the defendant, which direction is as follows (77 a):

"The Prothonotary is directed to enter judgment upon the determination of the Department of Revenue in Commonwealth Docket 1932, as follows:

No. 356 Tax	$3,340.35	
Interest at 1% per month from October 1, 1931, to March 16, 1933	601.26	
		$3,941.61

Inasmuch as a grave constitutional question has been raised by the defendant we think it unfair and inequitable to add the ten per cent. penalty to the judgment, as required by the act."

Defendant's exception is as follows (82 a):

"The Court erred in directing the Prothonotary to enter judgment against the defendant."

The Court's ruling is as follows (83 a):

"And now, May 15, 1933, it is ordered, adjudged and [fol. 93] decreed that the exceptions to the findings of fact and conclusions of law entered by us are all over-ruled, and judgments are directed to be entered in favor of the Commonwealth and against the defendant as indicated in our former opinion.

Frank Wickersham, A. L. Judge."

Eighth Assignment of Error

The court erred in its final order directing judgment in favor of the Commonwealth and against the appellant, which order and judgment are as follows (83a):

"Judgments are directed to be entered in favor of the Commonwealth and against defendant as indicated in our former opinion.

(Signed) Frank Wickersham, A. L. Judge."

"Judgment

Same day judgment in favor of the Commonwealth of Pennsylvania and against the Defendant in the sum of $3,941.61 pursuant to opinion heretofore filed" (84a).

[Note: There were three appeals argued together in the Court below at Commonwealth Docket Nos. 356, 357 and 358. This appeal is taken from the judgment entered at No. 356.]

Weil, Christy & Weil, Attorneys for Appellant.

[fol. 94] In Supreme Court of Pennsylvania, Middle District

[Title omitted]

Petition for Allowance of Appeal to the Supreme Court of the United States—Filed Sept. 7, 1934

To the Honorable the Chief Justice of the Supreme Court of Pennsylvania:

Wiloil Corporation respectfully petitions your Honor for an order allowing an appeal of the above case to the Supreme Court of the United States.

Petition to permit a reargument of the above case was presented July 12, 1934, and on the same day the Court made the following order:

"July 12, 1934.—Upon consideration a reargument is refused.

Per Curiam, F."

(Signed) Per Curiam, by Rob't S. Frazer, Chief Justice.

Respectfully submitted, J. Smith Christy, Attorney for Wiloil Corporation.

[fol. 95] [File endorsement omitted.]

[fol. 96] In Supreme Court of the United States

[Title omitted]

Petition for Appeal, Assignments of Error and Prayer for Reversal—Filed Sept. 7, 1934

Petition for Appeal

Considering itself aggrieved by the final decision of the Supreme Court of Pennsylvania in the above entitled cause, Wiloil Corporation, defendant in the Courts below, hereby prays that its appeal be allowed to the Supreme Court of the United States herein and for an order fixing the amount of bond thereon.

Assignments of Error

And the said Wiloil Corporation assigns the following errors in the record and proceedings in said case:

The Supreme Court of Pennsylvania erred—

1. In holding that the tax assessed against Wiloil Corporation (seller of the taxed goods) by the Commonwealth of Pennsylvania under the provisions of the Pennsylvania [fol. 97] Liquid Fuels Tax Act of 1931, P. L. 149, Purden's Pennsylvania Statutes Annotated, Title 72, Section 2611 (b) and (d) supplement, did not constitute an undue burden upon interstate commerce and was not in violation of

Article 1, Section 8, Clause 3 of the Federal Constitution; the goods taxed having been brought into Pennsylvania in fulfillment of a contract of sale previously entered into and having been delivered by railroad carriers direct to the purchaser in tank-car lots (original packages).

2. In holding that interstate commerce was only incidental to the transaction and not a part of it.

3. In holding that because the transaction was between citizens of the same State, although the shipments were interstate, that interstate commerce was only incidental.

4. In holding that under the terms of the contract appellant, Wiloil Corporation (the seller), was not required to make interstate shipments but could have fulfilled the contract by making shipments from any other point, including points in Pennsylvania, and therefore that interstate commerce was only incidental.

5. In *not* holding that even if the terms of the contract as to point of shipment were not obligatory upon the seller, Wiloil Corporation, nevertheless shipments made to fulfill the contract were in interstate commerce until the contract of sale previously entered into was consummated, and the taxing of the goods against the seller while in interstate commerce was in violation of the interstate commerce provision of the Federal Constitution.

6. In affirming the judgment of the Court of Common Pleas of Dauphin County, Pennsylvania.

[fol. 98] Prayer for Reversal

For which errors Wiloil Corporation prays that the said judgment of the Supreme Court of Pennsylvania dated June 30, 1934 (reargument refused July 12, 1934), affirming the judgment of the Court of Common Pleas of Dauphin County, Pennsylvania, in the above entitled case be reversed and a judgment rendered in favor of the said appellant, Wiloil Corporation and for costs.

A. Leo Weil, Attorney for Wiloil Corporation, Appellant. J. Smith Christy, of Counsel.

[fol. 99] [File endorsement omitted.]

[fol. 100] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed Sept. 7, 1934

Wiloil Corporation, appellant in the above entitled suit, having prayed for an appeal in this cause to the Supreme Court of the United States from the final judgment made and entered in the above entitled suit by the Supreme Court of Pennsylvania on the 30th day of June, 1934 (reargument refused July 12, 1934), and from each and every part of said judgment having presented its petition for appeal, assignments of error and prayer for reversal pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided; it is now here recorded that an appeal be and the same is hereby allowed by the Supreme Court of the United States from the Supreme Court of Pennsylvania in the above entitled cause as provided by law, and it is further ordered that the Clerk of the Supreme Court of Pennsylvania shall prepare and certify a transcript of the record of proceedings in judg-
[fol. 101] ment in this cause and transmit the same to the Supreme Court of the United States so that it shall have the same in said Court within 40 days from this date; and it is further ordered that security for costs on appeal be fixed in the sum of $500.

Dated Sept. 4th, 1934.

Rob't S. Frazer, Chief Justice of the Supreme Court of Pennsylvania.

[fols. 102-114] [File endorsement omitted.]

[fol. 115] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF POINTS ON WHICH IT INTENDS TO RELY, AND PARTS OF RECORD WHICH APPELLANT THINKS NECESSARY FOR CONSIDERATION THEREOF (SUPREME COURT RULE 13, SECTION 9)—Filed Oct. 4, 1934

(A) Appellant's Statement of Points on Which It Intends to Rely

1. The transaction was one in interstate commerce, and the tax imposed upon the appellant by the State authorities and upheld by the State court constituted an undue burden upon such commerce.

2. Shipments by appellant (seller) from Wilmington, Delaware, to the purchaser's private siding, Philadelphia, Pa., were made in fulfillment of contracts of sale previously entered into.

3. Shipments by appellant (seller) from Wilmington, [fol. 116] Delaware, to the purchaser at Philadelphia, Pa., were made in accordance with the terms of the contract of sale previously entered into, and had appellant made shipments from any other point or in any other manner than that required by the contract appellant would have incurred the risk of repudiation of the contract by the purchaser.

4. Assuming, however, that appellant was not required to perform the contract of sale according to its terms, nevertheless the shipments by appellant to fulfill the contract of sale previously entered into were in fact in interstate commerce and continued in interstate commerce until delivery was made to the purchaser on its private siding at Philadelphia, Pa.

5. The transaction was in interstate commerce notwithstanding the fact that the contract was between citizens of the same State.

Notice of the foregoing is hereby accepted, September 26th, 1934.

John Y. Scott, Deputy Attorney General.

(B) Parts of Record Which Appellant Thinks Necessary for Consideration of the Above Points

By stipulation of counsel.

Reference is here made to the printed record lodged with the Supreme Court of Pennsylvania and certified to this Court.

1. Stipulation to try without a jury and stipulation as to record to be printed (pages 7a and 8a).

2. The testimony, including all exhibits, beginning with 9a of the printed record to and including 58a.

3. Opinion of the Common Pleas Court, including findings of fact and conclusions of law, beginning with 59a of the printed record to and including the order directing the entry of judgment, 77a.

[fol. 117] 4. Appellant's exceptions to findings of fact and conclusions of law (78a to top of page 82a) are to be excluded and the following substituted therefor:

"NOTE: Appellant, Wiloil Corporation, filed exceptions to the findings of fact and conclusions of law of the Common Pleas Court of Dauphin County, Pa., in accordance with the State practice."

5. Opinion of the Court of Common Pleas of Dauphin County overruling exceptions to findings of fact and conclusions of law, including final judgment and certificates as they appear at 82a, 83a and 84a.

6. Opinion of the Supreme Court of Pennsylvania and that Court's mandate.

7. Appellant's petition filed with the Supreme Court of Pennsylvania for permission to reargue the case is to be excluded from the record and the following note substituted therefor:

"NOTE: The petition of Wiloil Corporation (appellant) for reargument was duly filed with the State Supreme Court on July 12th, 1934.

'Order of Court

July 12th, 1934—Upon consideration a reargument is refused.

Per Curiam, F.' "

8. Assignments of error to the Supreme Court of Pennsylvania.

9. Petition for allowance of appeal, assignments of error to the Supreme Court of the United States, and order allowing appeal to said Court.

[fols. 118 & 119] Agreed to this 26th day of September, 1934.

A. Leo Weil, Attorney for Wiloil Corporation. J. Smith Christy, of Counsel. John Y. Scott, Deputy Attorney General, for Commonwealth of Pennsylvania.

[fol. 120] [File endorsement omitted.]

Endorsed on cover: File No. 39,067. Pennsylvania Supreme Court. Term No. 439. Wiloil Corporation, appellant, vs. Commonwealth of Pennsylvania. Filed October 4, 1934. File No. 439, O. T., 1934.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 439

WILOIL CORPORATION,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

STATEMENT AS TO JURISDICTION ON APPEAL.

The appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

Judicial Code § 237, amended by the Act of February 13, 1925, Chapter 229, § 1, 43 Statutes 937, United States Code Annotated, Title 28, § 344 (a), to wit:

> "or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. • • •"

B.

State Supreme Court opinion and judgment (R. 77) reported, 173 Atl. Rep. 404, — Pa. —, in favor of validity.

C.

Date of Judgment and Date of Application for Appeal.

The judgment sought to be reviewed was entered on the 30th day of June, 1934 (R. 77*).

Petition for reargument, in accordance with the rules of the Supreme Court of Pennsylvania, was duly presented to that court, which reargument was refused on the 12th day of July, 1934 (R. 85).

The application for appeal, including assignments of error, was presented on the 4th day of September, 1934 (R. 96).

D.

The question that the tax was an undue burden on interstate commerce was raised in all the courts below. For evidence to that effect see introductory statement of Commonwealth's counsel (R. 9, top of page); introductory statement of appellant's counsel (R. 27); opinion of the Court of Common Pleas of Dauphin County (R. 69); said court's second conclusion of law (R. 71); and opinion of the Supreme Court (R. 77); also stipulation (R. 5).

In addition, the legal question, as required by the rules of the Supreme Court of Pennsylvania, was stated to that court as follows:

---

* [NOTE: All references to the record are to the pages of the certified record prepared by the Prothonotary of the Supreme Court of Pennsylvania and on file with the Clerk of this Court. The record has not yet been printed by the Clerk of this Court.]

"Does not the imposition of such a tax upon the appellant under the facts impose an undue burden upon interstate commerce and, therefore, if the Act be so construed as authorizing such a tax is it not in that respect unconstitutional, being in violation of the interstate commerce provision of the Federal Constitution?"

E.

Nature of the Case and Ruling Below.

Commonwealth of Pennsylvania assessed a tax against appellant claiming authority to do so under the provisions of the Liquid Fuels Tax Act of 1931, P. L. 149, Sections 2 and 4, Purdon's Pennsylvania Statutes Annotated Title 72, Sections 2611 (b) and (d) supplement. The taxing authorities of the State assessed a tax against appellant, and appellant appealed therefrom to the Common Pleas Court of Dauphin County, Pennsylvania. In that court the action was styled "Commonwealth of Pennsylvania, plaintiff, *vs.* Wiloil Corporation, defendant." The action was at law in assumpsit. By virtue of Pennsylvania Statute jury trial was waived.

Material portions of said Act are quoted in the Appendix hereto attached. The amending Act, to wit, 1931 P. L. 298, in no way affects questions at issue.

The Facts.

The facts upon which interstate commerce is claimed appear in appellant's (defendant in the courts below) Exhibits 3 and 4 (R. 51 and 52).

Said Exhibit 3 is the contract of sale, the terms of which are nowhere denied.

Appellant, formerly known as Willock Oil Corporation, sold oils and gasolines in car and barge lots, soliciting orders through its several agents.

Agents' orders were required to be confirmed by appellant at its Pittsburgh office. If approved, a confirmation order (said Exhibit 3) constituting the contract was forwarded at once to the purchaser.

The contract called for a particular kind of gasoline to be delivered to purchaser in tank-cars (original packages) at Philadelphia, Pennsylvania, from Wilmington, Delaware, the shipping point; delivery carrier—Reading R. R. The carrier and point of shipment were as contractual as any other part of the obligation.

Shipments to fulfill the contract previously entered into were made August 1, 3, 4, 5, 8, 10, 12 and 14, 1931. (See ink notations bottom and reverse side of said Exhibit 3 [R. 51].)

The tax involves several other contracts, but as the terms and bills of lading were identical it was stipulated at the trial that one contract and one bill of lading were sufficient proof.

Said Exhibit 4 (R. 52), the bill of lading, is a "straight bill", non-negotiable. The seller (appellant), owner of the goods, is named consignor; the purchaser, consignee; delivery carrier, Reading R. R.; point of shipment Wilmington, Delaware, and destination Philadelphia, Pa., purchaser's private siding; thus complying in every respect with the contract.

Appellant in no way acted as broker or agent. (See findings of fact 1 to 6 both inclusive of the Court of Common Pleas of Dauphin County [R. 54]).

It is submitted, based upon the above facts found by both the Courts below—

1. That shipments were made in fulfillment of contracts of sale previously entered into;

2. That they were made as required by the terms of the contract;

3. That the shipments were in interstate commerce, and continued to be so until delivery was finally made to the purchaser in whose hands they came to rest and who was the first one taxable under the uniform decisions of this Court.

The State Courts held:

1. That interstate commerce was not involved;

2. If involved such commerce was only incidental;

3. That the appellant, seller, was not required to perform its contract according to its terms but could have acquired the gasoline from points in Pennsylvania, applying as analogous the State income tax cases and brokers' license cases and other like cases.

F.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction in this case.

The tax was imposed upon the appellant, the seller of the gasoline, which shipped the same from Wilmington, Delaware, directly to the purchaser, consignee, at its private siding, Philadelphia, Pa., pursuant to a contract previously entered into.

(1.)

This Court Has Jurisdiction by Appeal.

(a) The State courts construed and enforced a taxing statute against appellant contrary to and in violation of the Federal commerce clause.

Carpenter v. *Shaw*, 280 U. S. 363, 367, 74 L. Ed. 478-482 (1930).

"Where a Federal right is concerned we are not bound by the characterization given to a state tax by state courts or relieved by it from the duty of considering the real nature of the tax and its effect upon the Federal right asserted."

Dahnke-Walker Milling Co. v. *Bondurant,* 257 U. S. 282, 288-289, 66 L. Ed. 239, 242-243 (1921). Opinion by Mr. Justice Van Devanter. The State court in that case, like the State court in the instant case, held that interstate commerce was not involved *and applied and enforced a* State statute which, except for the application in the particular case, was constitutional.

The court in said case held (U. S. Rep., bottom of page 288, L. Ed., page 243):

"In the state court the plaintiff did not simply claim a right or immunity under the Constitution of the United States, but distinctly insisted that, as to the transaction in question, the Kentucky statute was void, and therefore unenforceable, because in conflict with the commerce clause of the Constitution. The court did not accede to the insistence, but applied and enforced the statute. Of course, that was an affirmation of its validity when so applied." [Citing cases.]

"The case is therefore of the class described in the first of the provisions which we have quoted from the jurisdictional section. That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts, and yet valid as applied to another." [Citing cases.] • • •

"Our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error. Like rulings on like grounds will be found in *Eureka Pipe Line Co.* v. *Halla-*

nan. 257 U. S. 265, *ante,* 227, 42 Sup. Ct. Rep. 101, and *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277, *ante,* 234, 42 Sup. Ct. Rep. 105."

It is true that the 1916 amendment of Section 237, Judicial Code, was before the Court in that case but is also just as true that the jurisdictional words so construed are the same as they now appear in the 1925 amendment.

Fiske v. *Kansas,* 274 U. S. 380, 385, 71 L. Ed. 1108-1111, decided in 1926, supports the above case in every particular.

This Court in that case stated (U. S. Rep. 385, L. Ed. 1111):

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under §237 of the Judicial Code. • • •
>
> "The inquiry, then, is whether the statute is constitutional as applied and enforced in respect of the situation presented," [Citing cases.]

Concordia Fire Ins. Co. v. *Illinois,* 54 Sup. Ct. Rep. 30, 78 L. Ed. 1006 (1934)—Opinion by Mr. Justice Van Devanter. Constitutional question; denial of equal protection; Fourteenth Amendment. State authorities assessed foreign corporations at greater values than domestic corporations although the taxing act itself did not call for such discrimination.

(Opinion page 1011):

> "• • • The act deals specially and only with the taxation of net receipts of foreign fire, marine and inland navigation insurance corporations. The assessing officers acted in virtue of it and the state court held their action was valid under it. Thus both applied it,

and they applied it as subjecting the net receipts of a foreign fire insurance company, by reason of being such, to a tax burden 66⅔% greater than that laid on other personal property. No reasonable basis for such a discrimination is suggested and none is perceived. It is essentially the same character of arbitrary and prejudicial discrimination that was condemned as a denial of the equal protection of the laws in *Hanover F. Ins. Co.* v. *Harding* (*Hanover F. Ins. Co.* v. *Carr*) 272 U. S. 494, 71 L. Ed. 372, 47 S. Ct. 179, 49 A. L. R. 713.

"Whether a state statute is valid or invalid under the equal protection clause of the Fourteenth Amendment often depends on how the statute is construed and applied. It may be valid when given a particular application and invalid when given another. Here the application which was made of §30 in respect of the taxation of the net receipts of 1927, *i. e.*, the application made by the assessing officers and sustained by the Supreme Court, brought the section into conflict with the prohibition of that clause. This means that as so applied it is invalid, notwithstanding its validity in some different applications."

(b) Interstate commerce is involved and imposing the tax on the seller, appellant, under the facts in the instant case constitutes a direct and undue burden on interstate commerce.

Shipments from Delaware to Pennsylvania in the instant case were made to fulfill contracts of sale previously entered into.

Sonneborn Bros. v. *Cureton*, 262 U. S. 506-515, 67 L. Ed. 1095-1100 (1922).

Mr. Chief Justice Taft: (U. S. Rep. 515, L. Ed. 1100).

"Many of the sales by the appellants were made by them before the oil to fulfill the sales was sent to Texas. These were properly treated by the state au-

thorities as exempt from state taxation. They were, in effect, contracts for the sale and delivery of the oil across state lines. The soliciting of orders for such sales is equally exempt. Such transactions are interstate commerce in its essence, and any state tax upon it is a regulation of it and burden upon it." [Citing cases.]

Again in said case, commenting upon the case of *Bowman* v. *Continental Oil Company* (U. S. Rep. 519, L. Ed. 1102):

"* * * As to the excise tax, the court directed the injunction to issue with respect to the imposition upon 'sales of gasolene brought from without the state into the state of New Mexico, and there sold and delivered to customers in the original packages, whether tank cars, barrels, or other packages, and in the same form and condition as when received by plaintiff in that state.' If this covered gasolene that was ordered by the purchaser before importation, it was right. If it covered gasolene, whether in original packages or not, which was sold after it reached its destination, then it was not in accord with the law as we understand it to be under the authorities we have cited."

Askren v. *Continental Oil Company*, 252 U. S. 444-449; 64 L. Ed. 654-659;
Bowman v. *Continental Oil Co.*, 256 U. S. 642-643-649; 65 L. Ed 1139-1143-1145;
Standard Oil Co. v. *Graves*, 249 U. S. 389-394, 63 L. Ed. 662-666;
Gregg Dyeing Co. v. *Query*, 286 U. S. 472-478; 76 L. Ed. 1232-1236-7;
Brown v. *Maryland*, 12 Wheat 419, 6 L. Ed. 678;
Woodruff v. *Parham*, 8 Wall. 123, 19 L. Ed. 382;
Federal Trade Commission v. *Pacific States Paper Trade Association*, 273 U. S. 52-63-64, 71 L. Ed. 534-538-539.

Minnesota v. *Blasius*, 290 U. S. 1, 78 L. Ed. 19. Opinion by Mr. Chief Justice Hughes. Decided November 6, 1933.

(L. Ed. 22:)

> "• • • Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it. Similarly, the States may not tax property in transit in interstate commerce. But, by reason of a break in the transit, the property may come to rest within a State and become subject to the power of the State to impose a non-discriminatory property tax. • • •"

(L. Ed. 23:)

> "If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the State's power to tax it. [Citing cases.] If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement." [Citing cases.]

The movement in interstate commerce in the case at bar had begun and continued until delivery was made to the purchaser (Exhibits 3 and 4 [R. 51 and 52]). Such delivery was made in tank-car lots (original packages). There was no claim that they were in any way broken up, and the imposing of the tax upon the appellant, seller, is a direct and undue burden upon interstate commerce as shown by a uniform line of authorities of this Court cited above.

The interstate movement was continuous. There was no claim that it was ever in any sense interrupted.

The State Supreme Court attempted to distinguish the instant case and to hold interstate commerce was only incidental because the contract of sale was between citizens of the same State.

Bacon v. *Illinois*, 227 U. S. 504, 57 L. Ed. 615 (1913).

Syllabi 2:

> "The state cannot impose a tax upon articles moving in interstate commerce on the ground that such articles belong to its own citizens. They as well as others are under the protection of the commerce laws of the Constitution."

The above is fully supported by the Opinion of Mr. Justice Hughes, page 511.

(2)

The Error of the State Court is Apparent.

[Although the above, in our opinion, is amply sufficient to show the jurisdiction of this Court on appeal, the following is submitted as a precaution in the nature of an Addenda]:

(a) The tax imposed is a tax on property.

The tax in question in the instant case is not a license or a privilege tax or one based upon the amount of business transacted within the State, but is one imposed upon property after it has come into the State.

Commonwealth v. *Pure Oil Co.*, 303 Pa. 112-116, held that the Act of 1929, P. L. 1037, Section 3, imposed a tax upon property [the tax provision of said Act is the same as the Act of 1931 in question].

Dawson v. *Kentucky Distilleries Co.*, 255 U. S. 288-294, 65 L. Ed. 638-646.

The Taxing Act of May 21, 1931, P. L. 149, Section 4, Purdon's Pennsylvania Statutes Annotated Title 72, Section 2611 (d) Supplement, imposes the tax as follows:

> "A state tax of three cents a gallon or fractional part thereof, is hereby imposed and assessed upon all liquid fuels used or sold and delivered by distributors within this Commonwealth. * * *"

Distributors are required to pay the tax. Section 2 of said Act defines distributors. See Act quoted, appendix hereto.

By the bill of lading, Exhibit 4 (R. 52), the railroad carrier was bound at its peril to deliver the gasoline to the purchaser in tank-car lots (original packages).

The said bill of lading is a "straight bill" non-negotiable.

The Federal Bills of Lading Act of August 29, 1916, Chap. 415, Section 1, 39 Stat. 538, U. S. C. A. Title 49, Section 82, defines a "straight bill of lading" as follows:

> "A bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill."

By Section 82, U. S. C. A. Title 49 a straight bill of lading is non-negotiable and must be so noted on the bill itself.

Section 122, U. S. C. A. Title 49 defines consignee named in the bill as

> "the person to whom delivery of the goods is to be made."

(b) The courts below held that interstate commerce was not involved or if so it was only incidental.

They based this conclusion of law upon a further conclusion of law that the appellant was not required to make deliveries according to the terms of the contract but could

have, at its election, made deliveries from Pennsylvania or any other point.

Appellant was bound to perform strictly in accordance with the terms of its contract or suffer the possibility of repudiation. It agreed to ship from Wilmington, Delaware, purchaser to pay the freight from that point; delivery carrier—Reading R. R.

Norrington v. *Wright*, 115 U. S. 188 (1885), 29 L. Ed. 366 (Opinion by Mr. Justice Gray, page 203):

> "• • • The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. *Behn* v. *Burness*, 3B & S. 751; *Bowes* v. *Shand*, 2 App. cas. 455; *Lowber* v. *Bangs*, 2 Wall. 728; *Davison* v. *Lon Lingen*, 113 U. S. 40."

Filley v. *Pope*, 115 U. S. 213 (1885), 219, 29 L. Ed. 372;

Shepard's Citations show that the said cases have been cited with approval many times;

Mitsubishi Goshi Kaisha v. *J. Aron & Co., Inc.* (1926), 16 F. (2d) 185-186.

(c) Assuming, however, for the purpose of argument, that appellant was not bound to perform according to the terms of the contract and at its election could have shipped gasoline from points in Pennsylvania, nevertheless it did ship from Wilmington, Delaware, which was interstate commerce and continued to be until the goods were received by the purchaser on its private siding.

Western Union Telegraph Co. v. *Foster*, 62 L. Ed. 1006 at 1015, 247 U. S. 105 (1917), at page 113. Mr. Justice Holmes:

> "Thus lumber purchased in Texas for the purpose of filling foreign orders was held to be carried in interstate commerce, although no contract prevented the purchaser from giving it a different destination. * * * It is admitted that the transmission from New York to Massachusetts by the Telegraph Company was interstate commerce. If so it continued such until it reached 'the point where the parties originally intended that the movement should finally end.' *Illinois Central R. R. Co.* v. *Louisiana R. R. Commission*, 236 U. S. 157, 163."

Eureka Pipe Line Co. v. *Walter S. Hallanan*, 257 U. S. 265-272, 66 L. Ed. 227-232; last paragraph of the opinion;

Federal Trade Commission v. *Pacific States Paper Trade Association*, 273 U. S. 52, 63-64, 71 L. Ed. 534, 538-539.

The Federal Trade Commission case is directly in point and is controlling to the effect that even if the appellant had its election nevertheless the shipment was made in interstate commerce.

Mr. Justice Butler, U. S. Rep. page 64, L. Ed. 539:

> "The election of the seller to have the shipment made from a mill outside the state makes the transaction one in commerce among the states. And on these facts the sale by jobber to retailer is a part of that commerce."

Therefore we submit the shipment was in interstate commerce and continued until delivery was made to the purchaser after which time the goods came to rest and were then taxable against the purchaser and not the seller, appellant.

(3.)

The Cases Relied on by the State Courts Are Clearly Not Analogous.

Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S. 290, 66 L. Ed. 622. The tax involved in that case was a privilege tax assessed by the State of Illinois against a West Virginia corporation doing business in the State of Illinois.

Ware & Leland v. *Mobile County*, 209 U. S. 405, 52 L. Ed. 885. The tax involved in that case was a license tax imposed upon brokers engaged in the business of buying and selling futures for speculation or on commission. The taxpayer was a cotton broker. We think it is only necessary to state one fact appearing in the opinion—U. S. Rep. page 413:

> "the stipulated facts show that when the orders transmitted are received in the foreign State the property is bought in that State and there held for the purchaser."

Banker Bros. Co. v. Pennsylvania, 56 L. Ed. 168, 222 U. S. 210 (1911). The tax imposed in this case (mercantile tax) is based upon the amount of sales made in the state by merchants. Banker Bros. were retail vendors of Pierce Arrow automobiles at Pittsburgh, Pa. When they received an order from a Pennsylvania customer, they acquired the car from the Pierce Company at Buffalo, New York. The car was consigned to Banker Bros. and delivered to them at Pittsburgh, Penna.; they unloaded it (no doubt serviced it) and made physical delivery to the purchaser. The tax was based upon the sales made in Pennsylvania.

If the Banker Bros. case can in any way be construed as applying to the instant case (which we say it cannot) then we submit said case is clearly overruled by *Sonneborn Bros.* v. *Cureton, supra*, page 8 of this brief.

United States Glue Co. v. *Oak Creek,* 62 L. Ed. 1135, 247 U. S. 321, is a State income tax case and we believe no further comment is necessary.

Minnesota v. *Blasius,* 290 U. S. 1, 78 L. Ed. 19. The goods in that case were brought into Minnesota and were sold to the party taxed, who held them for future sale. The contention in that case was that the taxpayer contemplated a future sale of goods in interstate commerce and therefore they were not taxable because of the Federal commerce clause. The taxpayer did not at the time have any particular purchaser in contemplation. He made sales at public auction.

Federal Compress & Warehouse Company v. *McLean,* 291 U. S. 17, 78 L. Ed. 343-344. Held that the tax accrued while the goods were in storage and before interstate commerce had begun.

It is therefore respectfully submitted that this case is rightfully before this Court on appeal but if the Court be of a different opinion it is respectfully submitted that it is a case calling for the exercise by this Court of its supervisory powers and that to such end the writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Pennsylvania and finally reverse it.

Respectfully submitted,

A. Leo Weil,
Attorney for Appellant.

J. Smith Christy,
Of Counsel.

APPENDIX.

Material Portions of Liquid Fuels Tax Act of 1931, P. L. 149, Section 2, Purdon's Penna. Statutes Annotated, Title 72, Section 2611 (b) Supplement.

" 'Distributor'.—Any person, as herein defined who or which—

1. Produces, refines, prepares, blends, distils, manufactures, or compounds liquid fuels in the Commonwealth of Pennsylvania for his own use therein, or for sale and delivery therein.

2. Imports or causes to be imported from any other state or territory of the United States, or from a foreign country, liquid fuels for his own use in the Commonwealth of Pennsylvania, or for sale and delivery in and after reaching the Commonwealth, other than in the original package, receptacle, or container.

3. Imports or causes to be imported from any other state or territory of the United States liquid fuels for his own use in the Commonwealth of Pennsylvania, or for sale and delivery therein, after the same have come to rest or storage therein, whether or not in the original package, receptacle, or container.

4. Purchases or receives liquid fuels in the original package, receptacle, or container in the Commonwealth of Pennsylvania for his own use, or for sale and delivery therein, from any person who has imported the same from a foreign country.

5. Purchases or receives liquid fuels in the original package, receptacle, or container in the Commonwealth of Pennsylvania for his own use therein, or for sale and delivery therein, from any person who has imported the same from any other state or territory of the United States, in case such liquid fuels have not, prior to such purchase or receipt, come to rest or storage in the Commonwealth of Pennsylvania.

6. Receives and, in any manner, uses or distributes liquid fuels in the Commonwealth of Pennsylvania on which the tax provided for in this act has not been previously paid."

Section 4 of Said Act, Purdon's Pennsylvania Statutes Annotated, Title 72, Page 2611 (d) Supplement.

Imposition of Tax:

"A State tax of three cents a gallon, or fractional part thereof, is hereby imposed and assessed upon all liquid fuels used or sold and delivered by distributors within this Commonwealth."

27

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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1934.

NO. 439

WILOIL CORPORATION, Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA.

Appeal From the Supreme Court of Pennsylvania.

BRIEF FOR APPELLANT.

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Supreme Court of the United States

OCTOBER TERM, 1934.

NO. 439

WILOIL CORPORATION, Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA.

Appeal From the Supreme Court of Pennsylvania.

A.

Official Reports of Opinions in the Courts Below.

The opinion of the Supreme Court of Pennsylvania is reported in 316 Pa. 33, Advanced Reports of October 12, 1934, also appears (R. 50), also reported in 173 Atlantic Reporter 404.

The opinion of the Court of Common Pleas of Dauphine County appears (R. 35), and is reported in 37 Dauphin County Reports, 63.

B.

At the time application was made for allowance of appeal, paragraph 1 of Rule 12 was complied with, the required printed copies were filed, styled "Statement as to Jurisdiction," and therefore, as we understand Rule 27-2 (c), it is unnecessary to include the same here.

For the convenience of the Court, however, since the record was not printed at the time the "Statement

as to Jurisdiction" was filed, we here give the following with record references.

Date of Judgment and Date of Application for Appeal.

Opinion and judgment of the State Supreme Court was entered June 30, 1934 (R. 50-57). Petition for reargument in accordance with the rules of said Court was duly presented and reargument refused on July 12, 1934 (R. 57). Application for Appeal, including assignments of error, was presented on September 4, 1934 (R. 63). Filed Sept. 7, 1934.

Constitutional Question Was Raised in All the Courts Below.

Appellant claimed in all the Courts below and before the taxing authorities that said taxing act as so applied was unconstitutional in that the imposition of such a tax was in violation of the commerce provision of the Federal Constitution, Article I, Section 8, Clause 3, in that it constituted an undue burden upon interstate commerce.

That such questions were timely raised is evidenced by the introductory statement of Commonwealth's counsel (R. 4); introductory statement of appellant's counsel (R. 16); opinion of the Court of Common Pleas of Dauphin County (R. 35); said Court's second conclusion of law (R. 47), and opinion of the State Supreme Court (R. 50).

Ruling of the Courts Below.

The ruling of the Common Pleas Court of Dauphin County was—2nd conclusion of law (R. 47):

> "The interstate commerce law is not involved in the instant case."

Judgment was in favor of the Commonwealth.

Affirming the judgment of the Common Pleas Court, the Supreme Court of Pennsylvania ruled that interstate commerce was only incidental and that the imposition of said tax did not therefore constitute a burden upon interstate commerce, applying as analogous the State income tax cases, brokers' license cases, and other like cases. (State Supreme Court's opinion, 173 Atl. Rep. 404, 316 Pa. 33, and R. 50).

The second question raised in and discussed by the Courts below, to wit,

> That under the terms of the contract of sale title passed to the purchaser at Wilmington, Delaware,

is not raised here as being a State question except as the same facts and conclusions may relate to the Federal question involved.

Reference to Cases Believed to Sustain Jurisdiction.

For cases believed to sustain jurisdiction reference is made to cases cited on pages 5 to 8 of "Statement as to Jurisdiction" printed and filed under the requirements of paragraph 1 of Rule 12. See same cases cited and quoted pages 9 and 10 herein.

Since the question of interstate commerce goes to the merits, as well as to the jurisdiction, such cases are cited hereafter in the argument on the merits.

C.

Statement of the Case.

Commonwealth of Pennsylvania assessed a tax against appellant claiming authority to do so under the provisions of the Liquid Fuels Tax Act of 1931, P. L. 149, Sections 2 and 4, *Purdon's Pennsylvania Statutes Annotated Title 72,* Sections 2611 (b) and (d) Pocket Supplement.

Material portions of said Act are quoted in the appendix hereto and other sections of the Act are there digested.

The State Courts upheld the tax, assigning as reason (Common Pleas Court) that the liquid fuels had come to rest—(State Supreme Court) that interstate commerce was only incidental.

Appellant contended throughout that the tax was illegal because it imposed an undue burden upon interstate commerce.

The liquid fuels taxed were brought into Pennsylvania from Wilmington, Delaware, consigned by the appellant (seller) direct to the purchaser, consignee, in tank-cars (original packages), at its private siding, Philadelphia, Pennsylvania, in fulfillment of a contract of sale previously entered into. The Courts below so found. Findings of fact Common Pleas Court of Dauphin County 1 to 6 (R. 35) and particularly findings of fact 3, 5, 6 (R. 35) to wit:

> "3. While the order in this case was for ten cars only one car a day was shipped to the purchaser, the arrangement being that the purchaser should call upon the defendant when they wanted these tank-car shipments."
>
> "5. It was stipulated that other shipments of liquid fuels sold by the defendant to the Ace Oil Corporation and High Powered Gasoline Company

were similarly made and that it would not be necessary to offer proof thereof."

"6. The liquid fuels sold by the defendant to Ace Oil Corporation and High Powered Gasoline Company were purchased by the defendant from the Crane Hook Company of Wilmington, Dela., and were shipped to the consignee on order of the defendant."

Mr. Justice Schaffer, in the opinion of the State Supreme Court states [R. 51]:

"* * * To fill the orders taken by its agent appellant obtained the gasoline from the Crane Hook Company in Wilmington, Delaware. Shipments were made direct from Wilmington to the purchasers in Philadelphia or Essington, Pennsylvania. In each instance the car containing the gasoline moved under a bill of lading showing appellant as consignor and either one or the other of the two purchasing concerns as consignee. The place of shipment was indicated as Wilmington, and of destination as Philadelphia, or Essington, consignee's private sidings. Freight was not prepaid and the consignee paid it. * * *"

The evidence supporting the above is documentary, appellant's Exhibit 3 (R. 32), being the contract of sale, and appellant's Exhibit 4 (R. 33), showing that shipments were made in compliance with the contract of sale.

[NOTE: Exhibits 3 and 4 are in the name of Willock Oil Corporation. By due proceedings the name was changed to Wiloil Corporation (R. 5)]

Ink notations on said exhibit 3 show dates tank cars were shipped [R. 32] [R. 26].

D.

Assignments of Error.

The Supreme Court of Pennsylvania erred—

1. In holding that the tax assessed against Wiloil Corporation (seller of the taxed goods) by the Commonwealth of Pennsylvania under the provisions of the Pennsylvania Liquid Fuels Tax Act of 1931, P. L. 149, *Purdon's Pennsylvania Statutes Annotated,* Title 72, Section 2611 (b) and (d) supplement, did not constitute an undue burden upon interstate commerce and was not in violation of Article 1, Section 8, Clause 3 of the Federal Constitution; the goods taxed having been brought into Pennsylvania in fulfillment of a contract of sale previously entered into and having been delivered by railroad carriers direct to the purchaser in tank-car lots (original packages).

2. In holding that interstate commerce was only incidental to the transaction and not a part of it.

3. In holding that under the terms of the contract appellant, Wiloil Corporation (the seller), was not required to make interstate shipments but could have fulfilled the contract by making shipments from any other point, including points in Pennsylvania, and therefore that interstate commerce was only incidental.

4. In *not* holding that even if the terms of the contract as to point of shipment were not obligatory upon the seller, Wiloil Corporation, nevertheless shipments made to fulfill the contract were in interstate commerce until the contract

of sale previously entered into was consummated, and the taxing of the goods against the seller while in interstate commerce was in violation of the interstate commerce provision of the Federal Constitution.

5. In affirming the judgment of the Court of Common Pleas of Dauphin County, Pennsylvania.

ARGUMENT.

The facts we believe are sufficiently stated in the "Statement of the Case," pages 4 and 5 herein, and reference is made thereto.

They, we believe, conclusively show that the tax was imposed upon goods while in interstate commerce, having been brought into the State in tank-car lots (original packages) in fulfillment of contracts of sale previously entered into.

The Commonwealth of Pennsylvania claimed authority to tax under the provisions of the Liquid Fuels Tax Act of 1931, P. L. 149, Sections 2 and 4, *Purdon's Pennsylvania Statutes Annotated,* Title 72, sections 2611 (b) and (d) Pocket Supplement.

The material part of the title of the Act is:

"Imposing a State tax, payable by those herein defined as distributors on liquid fuels used or sold and delivered within the Commonwealth, * * *."

(page 154):

"Section 4. Imposition of Tax; * * * A State tax of three cents a gallon, or fractional part thereof, is hereby imposed and assessed upon all liquid fuels used or sold and delivered by distribu-

tors within this Commonwealth, excepting liquid fuels delivered to the United States government on presentation of a duly authorized United States government exemption certificate or other evidence satisfactory to the department, and such liquid fuels used or sold and delivered as are not within the taxing power of this Commonwealth under the Commerce Clause of the Constitution of the United States. * * *"

(pages 150-151):

"Section 2 * * *

'Distributor.' Any person, as herein defined, who or which—

1. Produces, refines, prepares, blends, distils, manufactures, or compounds liquid fuels in the Commonwealth of Pennsylvania for his own use therein, or for sale and delivery therein.

2. Imports or causes to be imported from any other state or territory of the United States, or from a foreign country, liquid fuels for his own use in the Commonwealth of Pennsylvania, or for sale and delivery in and after reaching the Commonwealth, other than in the original package, receptacle, or container.

3. Imports or causes to be imported from any other state or territory of the United States liquid fuels for his own use in the Commonwealth of Pennsylvania, or for sale and delivery therein, after the same have come to rest or storage therein, whether or not in the original package, receptacle, or container.

4. Purchases or receives liquid fuels in the original package, receptacle, or container in the Commonwealth of Pennsylvania for his own use, or for sale and delivery therein, from any person who has imported the same from a foreign country.

5. Purchases or receives liquid fuels in the original package, receptacle, or container in the Commonwealth of Pennsylvania for his own use therein, or for sale and delivery therein, from any person who has imported the same from any other state or territory of the United States, in case such liquid fuels have not, prior to such purchase or receipt, come to rest or storage in the Commonwealth of Pennsylvania.

6. Receives and, in any manner, uses or distributes liquid fuels in the Commonwealth of Pennsylvania on which the tax provided for in this act has not been previously paid."

Material portions of the Act appendix p. 30 herein.

The taxing authorities applied the taxing statute in the instant case in violation of the Federal Constitution and the State Courts upheld the tax. Section 6 above may be construed and applied in a constitutional or unconstitutional sense.

Fiske v. Kansas, 274 U. S. 380, 385, 71 L. Ed. 1108-1111. The Court in that case stated (U. S. Rep. 385, L. Ed. 1111):

"A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under § 237 of the Judicial Code.
* * *

The inquiry, then, is whether the statute is constitutional as applied and enforced in respect of the situation presented. *Ward & Gow v. Krinsky,*

259 U. S. 503, 510, 66 L. ed. 1033, 1036, 28 A. L. R. 1207, 42 Sup. Ct. Rep. 529; *Cudahy Packing Company v. Parramore,* 263 U. S. 418, 422, 68 L. ed. 366, 368, 30 A. L. R. 532, 44 Sup. Ct. Rep. 153, 23 N. C. C. A. 744. And see *St. Louis, I. M. & S. R. Co. v. Wynne,* 224 U. S. 354, 359, 56 L. ed. 799, 800, 42 L. R. A. (N. S.) 102, 32 Sup. Ct. Rep. 493."

Concordia Fire Ins. Co. v. Illinois, 292 U. S. 535, 78 L. Ed. 1411 (1934). Opinion by Mr. Justice Van Devanter. Constitutional question; denial of equal protection; Fourteenth Amendment. State authorities assessed foreign corporations at greater values than domestic corporations although the taxing act itself did not call for such discrimination.

U. S. page 545, Law Ed. 1418:

"* * * The act deals specially and only with the taxation of net receipts of foreign fire, marine and inland navigation insurance corporations. The assessing officers acted in virtue of it and the state court held their action was valid under it. Thus both applied it, and they applied it as subjecting the net receipts of a foreign fire insurance company, by reason of being such, to a tax burden 66 2/3% greater than that laid on other personal property. No reasonable basis for such a discrimination is suggested and none is perceived. It is essentially the same character of arbitrary and prejudicial discrimination that was condemned as a denial of the equal protection of the laws in *Hanover F. Ins. Co. v. Harding* (*Hanover F. Ins. Co. v. Carr*), 272 U. S. 494, 71 L. Ed. 372, 47 S. Ct. 179, 49 A. L. R. 713.

Whether a state statute is valid or invalid under the equal protection clause of the Fourteenth Amendment often depends on how the statute is

construed and applied. It may be valid when given a particular application and invalid when given another. Here the application which was made of § 30 in respect of the taxation of the net receipts of 1927, *i. e.,* the application made by the assessing officers and sustained by the Supreme Court, brought the section into conflict with the prohibition of that clause. This means that as so applied it is invalid, notwithstanding its validity in some different applications."

> *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282, 288-289, 66 L. Ed. 239, 242-243 (1921).

The above three cases are jurisdictional cases and are cited in appellant's "Statement as to Jurisdiction" originally filed and referred to but are again cited here for the convenience of the Court and to explain appellant's contention as to jurisdiction.

The act as so applied in the instant case is unconstitutional.

The propositions that will be argued are—

I.

THE GOODS WERE IN INTERSTATE COMMERCE AND THE TAXING OF THEM AGAINST THE APPELLANT CONSTITUTED AN UNDUE BURDEN ON THAT COMMERCE.

II.

THE CONTRACTS OF SALE WERE HONESTLY ENTERED INTO AND WITH NO INTENT TO DEFRAUD THE STATE OF THE TAX.

The above will be argued in their order.

I.

THE GOODS WERE IN INTERSTATE COMMERCE AND THE TAXING OF THEM AGAINST THE APPELLANT CONSTITUTED AN UNDUE BURDEN ON THAT COMMERCE.

We believe the tax imposed is a tax on property. The Supreme Court of Pennsylvania in *Commonwealth v. Pure Oil Company,* 303 Pa. 112-116, held that the tax imposed by the Act of 1929, P. L. 1037, Section 3 was a tax on property. Material part of the title of said Act of 1929 is:

"Imposing a State tax on liquid fuels, * * *"

Section 3 of said Act imposing the tax is in effect identical with Section 4 of the said Act of 1931, P. L. 149.

Dawson v. Kentucky Distilleries Co., 255 U. S. 288, 294, 65 L. Ed. 638, 646.

But whether it be a tax on property or an excise tax, if it imposes an undue burden upon interstate commerce it is unconstitutional.

Minnesota v. Blasius, 290 U. S. 1, 78 L. Ed. 131, Opinion by Mr. Chief Justice Hughes (1933).

(U. S. Rep. 9, Law. Ed. 135):

"* * * Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it. Similarly, the *States may not tax property in transit in interstate commerce.* But, by reason of a break in the transit, the property may come to rest within a State and become subject to the power of the State to impose a nondiscriminatory property tax." (Italics ours).

The facts in this case show conclusively that the shipments of the gasoline were made in interstate commerce and continued in interstate commerce until they were received by the purchaser in Pennsylvania, in whose hands they came to rest and were taxable against the purchaser and not the seller, appellant in this case.

The decisions of this Court are uniformly to the effect that interstate commerce continues until the goods are received by the consignee, purchaser, if the goods were brought in in fulfillment of a contract of sale previously entered into.

That the goods were brought in in fulfillment of a contract of sale previously entered into is also conclusively shown by the Common Pleas Court's findings of fact, quoted pages 4-5 herein, and by the statements of fact of the State Supreme Court (quoted page 5 herein) and evidenced by the contract of sale, appellant's Exhibit 3 (R. 32), and the bill of lading, appellant's Exhibit 4 (R. 33).

In *Sonneborn Brothers v. Keeling* (Cureton), 262 U. S. 506, 67 L. ed. 1095, Mr. Chief Justice Taft, after carefully reviewing numerous cases including *Brown v. Maryland,* 12 Wheat. 419, 6 L. ed. 678, *Woodruff v. Parham,* 8 Wall. 123, 19 L. Ed. 382, *Standard Oil Company v. Graves,* 249 U. S. 389, 63 Law. Ed. 662; *Askren v. Continental Oil Company,* 252 U. S. 444, 64 Law. Ed. 654; *Bowman v. Continental Oil Company,* 256 U. S. 642, 65 Law. ed. , 1139, *Texas Company v. Brown,* 258 U. S. 466, 66 Law. Ed. 721, concluded (U. S. Reps. 515—Law. Ed. 1100):

> "Many of the sales by the appellants were made by them before the oil to fulfil the sales was sent to Texas. These were properly treated by the state authorities as exempt from state taxation.

They were, in effect, contracts for the sale and delivery of the oil across state lines. The soliciting of orders for such sales is equally exempt. Such transactions are interstate commerce in its essence, and any state tax upon it is a regulation of it and a burden upon it. *Robbins v. Shelby County Taxing Dist.,* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Asher v. Texas,* 128 U. S. 129, 32 L. ed, 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Stoutenburgh v. Hennick,* 129 U. S. 141, 147, 32 L. ed. 637, 638, 9 Sup. Ct. Rep. 256; *Caldwell v. North Carolina,* 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; *Rearick v. Pennsylvania,* 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; *Brennan v. Titusville,* 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Dozier v. Alabama,* 218 U. S. 124, 54 L. ed. 965, 28 L. R. A. (N. S.) 264, 30 Sup. Ct. Rep. 649; *Crenshaw v. Arkansas,* 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; *Stewart v. Michigan,* 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476; *Western Oil Ref. Co. v. Lipscomb,* 244 U. S. 346, 61 L. ed. 1181, 37 Sup. Ct. Rep. 623."

And again U. S. Reps. page 519—Law. Ed. 1102:

"* * * As to the excise tax, the court directed the injunction to issue with respect to the imposition upon 'sales of gasolene brought from without the state into the state of New Mexico, and there sold and delivered to customers in the original packages, whether tank-cars, barrels, or other packages, and in the same form and condition as when received by plaintiff in that state.' If this covered gasolene that was ordered by the purchaser before importation, it was right. If it covered gasolene, whether in original packages or not,

which was sold after it reached its destination, then it is not in accord with the law as we understand it to be under the authorities we have cited."

There is nothing in the instant case to indicate in the least that the goods had come to rest, or that they were brought in by the appellant for the purpose of future sale, or that the original packages were broken up, or that there was an interruption in transit.

Nor was there ever any such claim by the Commonwealth although the Common Pleas Court did conclude erroneously however that the goods had come to rest (argued page 16 herein).

The goods were brought in in fulfillment of a contract of sale previously entered into and Mr. Chief Justice Taft makes it clear in the above opinion that in such a case interstate commerce continues until the goods are received by the consignee and that a tax (property or excise) imposed during that commerce is a burden upon it and is illegal.

Tank-cars are original packages.

Askren v. Continental Oil Co., 252 U. S. 444, 449, 64 Law. Ed. 654.

The State Courts held that title passed at Philadelphia, Pennsylvania. The passing of title, however, does not affect the interstate commerce question.

Pennsylvania Railroad Company v. Clark Bros. Coal Company, 238 U. S. 456, 465, bottom of page:

"In determining whether commerce is interstate or intrastate, regard must be had to its essential character. Mere billing or the place at which title passes is not determinative."

Comments Upon the Opinions and Conclusions of the State Courts in the Instant Case.

(1) *As to the Common Pleas Court of Dauphin County*—That Court concluded—2nd conclusion of law (R. 47):

> "The interstate commerce law is not involved in the instant case."

and based that conclusion on its 1st conclusion (R. 47):

> "The sale and delivery of the liquid fuels in question were made and delivered to the purchasers in Pennsylvania where the liquid fuels so purchased 'came to rest.'"

It is true said 1st conclusion does not state in whose hands the liquid fuels came to rest, but resort to the opinion and the judgment of that Court convinces that the Court intended to state that the goods came to rest in the hands of the seller, appellant.

A glance at the contract of sale, appellant's Exhibit 3 (R. 32), and the bill of lading, appellant's Exhibit 4 (R. 33) will show that such a conclusion was impossible both from a legal and physical standpoint.

In the bill of lading appellant, seller, was named the consignor, the purchaser the consignee, and the State Supreme Court states in its opinion, 316 Pa. top of page 35,

> "The place of shipment was indicated as Wilmington, and the destination as Philadelphia or Essington, *consignee's private sidings.*"

Said bill of Lading was in compliance with the Federal Bills of Lading Act of August 29, 1916, Chapter 415, 39 Statutes 538, U. S. C. A. Title 49, Section 82.

Said bill is entitled: "Uniform Straight Bill of Lading, Not Negotiable."

Section 82 of said Bills of Lading Act defines a "straight bill of lading" as follows:

> "A bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill."

Said Act further provides that a straight bill of lading is non-negotiable and must be so noted on the bill.

Section 122 defines consignee named in the bill as

> "the person to whom delivery of the goods is to be made."

The railroad company made delivery exactly as required by said bill.

It is apparent that the State Supreme Court realized that the Common Pleas Court's position was untenable and it therefore sought another ground, to wit, that interstate commerce was incidental only, which ground we feel confident is equally untenable.

(2) *As to the State Supreme Court's Opinion and Conclusions—*

The contract of sale, appellant's Exhibit 3 (R. 32), (repeating for emphasis), sets forth that shipments of a particular kind of gasoline were to be made from Wilmington, Delaware over the Reading Railroad to Philadelphia.

The State Supreme Court held that the appellant was not required to ship from Wilmington, Delaware, under the terms of the contract, but could have shipped the gasoline from any point it saw fit, including points

in Pennsylvania, and, therefore, for that reason interstate commerce was only incidental.

(a) The State Court was deciding a Federal question and its conclusion as to the effect of the contract was erroneous, and

(b) Even if the appellant could have made shipments from points in Pennsylvania at its election the fact nevertheless remains that the shipments were made from Wilmington, Delaware.

(a) THE STATE SUPREME COURT WAS IN ERROR AS TO THE EFFECT OF THE CONTRACT.

The State Supreme Court was passing ultimately upon the question of interstate commerce.

When a Federal right is involved, this Court will examine both fact and law to ascertain whether or not that right has been violated regardless of the State Court's action.

Carpenter v. Shaw, 280 U. S. 363, bottom of page 367, 74 Law Ed. 478 at page 482. Opinion by Mr. Justice Stone:

> "Where a Federal right is concerned, we are not bound by the characterization given to a State tax by State courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the Federal right asserted." [Citing cases]

Fiske v. Kansas, 274 U. S. 380, 385, 71 L. Ed. 1108-1111. Opinion by Mr. Justice Sanford:

> "And this court will review the finding of facts by a state court where a Federal right has been

denied as the result of a finding shown by the record to be without evidence to support it; *or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.*"

Further, the State Supreme Court was construing and applying (erroneously we claim) decisions of this Court as evidenced by the citations in its opinion.

Comments on these decisions showing their inapplicability to the instant case will be made later in this argument. (Page 23 herein).

That the appellant was not bound by the terms of its contract is contrary to the law announced by this Court.

Appellant was bound to perform strictly in accordance with the terms of its contract or suffer the possibility of repudiation.

Norrington v. Wright, 115 U. S. 188 (1885), 29 L. Ed. 366 (Opinion by Mr. Justice Gray, U. S. Rep., page 203, L. Ed. 368):

"* * * The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say a condition precedent, upon the failure or nonperformance of which the party aggrieved

may repudiate the whole contract. *Behn v. Burness,* 3 B. & S. 751; *Bowes v. Shand,* 2 App. cas. 455; *Lowber v. Bangs,* 2 Wall. 728; *Davison v. von Lingen,* 113 U. S. 40."

Filley v. Pope, 115 U. S. 213 (1885), 219, 29 L. Ed. 372;

Shepard's Citations show that the said cases have been cited with approval many times;

Mitsubishi Goshi Kaisha v. J. Aron & Co., Inc. (1926), 16 F. (2d) 185-186.

The rule of substantial performance would not have protected the appellant had it elected to ship from some other point and the shipments had been delayed for an unreasonable time beyond the average time from Wilmington, Delaware, to Philadelphia.

(b) EVEN IF THE APPELLANT COULD HAVE MADE SHIPMENTS FROM POINTS IN PENNSYLVANIA AT ITS ELECTION THE FACT NEVERTHELESS REMAINS THAT SHIPMENTS WERE MADE FROM WILMINGTON, DELAWARE.

Assuming, however, for the purpose of argument that appellant was not bound to perform according to the terms of the contract and at its election could have shipped gasoline from points in Pennsylvania, nevertheless the fact remains that it did ship from Wilmington, Delaware, to Philadelphia, which was interstate commerce, and continued to be so until the goods were received by the purchaser on its private siding.

Western Union Telegraph Co. v. Foster, 247 U. S. 105 (1917) at page 113, 62 L. Ed. 1006 at 1015. Mr. Justice Holmes:

"Thus lumber purchased in Texas for the purpose of filling foreign orders was held to be carried in interstate commerce, although no contract prevented the purchaser from giving it a different destination. * * * It is admitted that the transmission from New York to Massachusetts by the Telegraph Company was interstate commerce. If so, it continued such until it reached the point where the parties originally intended that the movement should finally end.' *Illinois Central R. R. Co. v. Louisiana R. R. Commission,* 236 U. S. 157, 163."

Eureka Pipe Line Co. v. Walter S. Hallanan, 257 U. S. 265-272, 66 L. Ed. 227-232.

Federal Trade Commission v. Pacific States Paper Trade Association, 273 U. S. 52, 71 L. Ed. 534. Opinion by Mr. Justice Butler.

(U. S. Rep. 63—Law. Ed. 538):

"* * * The seller is free to have delivery made from any source within or without the state. * * * The question is whether the sale by the wholesaler to the retailer in the same state is a part of interstate commerce where, subsequently at the instance of the seller and to perform his part of the contract, the paper is shipped from a mill in another state to or for the retailer. * * *"

(U. S. Rep. 64—Law. Ed. 539):

"* * * And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. *Dozier v. Alabama,* 218 U. S. 124, 128, 54 L. ed. 965, 967, 28 L. R. A. (N. S.) 264, 30 Sup. Ct. Rep. 649. Such commerce is not confined to transportation,

but comprehends all commercial intercourse between different states and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one State to another. *Dahnke-Walker Mill. Co. v. Bondurant,* 257 U. S. 282, 290, 66 L. ed. 239, 243, 42 Sup. Ct. Rep. 106; *Lemke v. Farmers' Grain Co.,* 258 U. S. 50, 55, 66 L. ed. 458, 462, 42 Sup. Ct. Rep. 244. The absence of contractual relation between the manufacturer and retailer does not matter. The sale by the wholesaler to the retailer is the initial step in the business completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the state. *If the contract of sale provided for shipment to the purchaser from a mill outside the state, then undoubtedly it would be an essential part of commerce among the states. Sonneborn Bros. v. Cureton (Sonneborn Bros. v. Keeling),* 262 U. S. 506, 515, 67 L. ed. 1095, 1100, 43 Sup. Ct. Rep. 643. *Clearly the absence of such a provision does not affect the substance of the matter when in fact such a shipment was contemplated and made. Cf. Dozier v. Alabama, supra; Western U. Teleg. Co. v. Foster,* 247 U. S. 105, 113, 62 L. ed. 1006, 1015, 1 A. L. R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438; *Lemke v. Farmers' Grain Co., supra,* 55 (66 L. ed. 462, 42 Sup. Ct. Rep. 244). *The election of the seller to have the shipment made from a mill outside the state makes the transaction one in commerce among the States. And on these facts the sale by jobber to retailer is a part of that commerce."* [Italics ours.]

The State Supreme Court seemed to attach some importance to the fact that appellant and purchaser

were both citizens of the same state. We submit that citizenship does not enter into the determination of the question of interstate commerce.

> *Bacon v. Illinois,* 227 U. S. 504, 57 Law. Ed. 615. (Syllabi 2):
>
> "The state cannot impose a tax upon articles moving in interstate commerce on the ground that such articles belong to its own citizens. They as well as others are under the protection of the commerce clause of the Constitution."

The Cases Relied on by the State Courts Are Clearly Not Analogous.

Banker Bros. v. Commonwealth of Pennsylvania, 222 U. S. 210, 56 L. Ed. 168 (1911) is, in our opinion, clearly not in point. The tax in that case was imposed against Banker Bros. Company under authority of the Act of 1899, P. L. 184, known as the Mercantile Tax Act. The Act imposed an annual fee or a license tax upon merchants transacting business within the State and an additional tax based upon the amount of business transacted within the State. It did not tax any particular property or property as a class or property in general. The tax was determined solely upon the value of the total business done within the State by merchants.

Banker Bros. were in the business of selling Pierce-Arrow automobiles in the City of Pittsburgh. They contracted generally with the Pierce-Arrow Company located at Buffalo, New York, to purchase said automobiles from that company. By the terms of the contract, Banker Bros. were required, upon ordering an automobile, to pay a certain amount on account of the purchase and the balance upon receipt of the car. The contract was between the Pierce Company and Banker

Bros. When a car was ordered by Banker Bros. from Pierce Company, and upon receipt of the initial payment, Pierce Company, in accordance with the general contract, would consign the car to Banker Bros. with a sight draft attached to the bill of lading for the balance of the purchase price. Banker Bros. thus paid for the car, took possession of it (no doubt serviced it), and later delivered it to their purchaser.

The main contention in the case was that Banker Bros. were acting as agents for Pierce Company in the sale of its cars and, therefore, the transaction was the same as if the final purchaser and user of the car had contracted directly with the Pierce Company. This Court held that the contract between Banker Bros. and Pierce Company was not a contract of agency and that there were two distinct transactions,—a purchase by Banker Bros. from Pierce Company, and a purchase from Banker Bros. by the user of the car. Under those circumstances, the car having been consigned to Banker Bros. and they having paid for it and taken it into their possession in Pennsylvania, the car had come to rest in their hands in Pennsylvania and this Court so held.

> (Opinion by Mr. Justice Lamar—U. S. Reps. page 213, Law Ed. 170):
>
> "* * * The Banker Brothers Company, on paying the draft, took up the bill of lading, received from the carrier an automobile which though shipped in interstate commerce had become at rest in the State of Pennsylvania."

Said case would be in point if the tax in the instant case had been assessed against appellant's purchaser and not appellant, and appellant's purchaser were here resisting the tax.

Furthermore, we submit that said Banker Bros. Company case, if it ever was applicable, is clearly overruled as to the instant case by *Sonneborn Bros. v. Keeling, supra,* quoted page 13 herein.

Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290, 66 L. Ed. 622. The tax involved in that case was a privilege tax assessed by the State of Illinois against a West Virginia corporation doing business in the State of Illinois.

Ware & Leland v. Mobile County, 209 U. S. 405, 52 L. Ed. 855. The tax in that case was a license tax imposed upon brokers engaged in the business of buying and selling futures for speculation or on commission. The taxpayer was a cotton broker. We think it is only necessary to state one fact appearing in the opinion—U. S. Rep. page 413, L. Ed. 859:

> "the stipulated facts show that when the orders transmitted are received in the foreign State the property is bought in that State and there held for the purchaser."

United States Glue Co. v. Oak Creek, 247 U. S. 321, 62 L. Ed. 1135, is a State income tax case and we believe no further comment is necessary.

Minnesota v. Blasius, 290 U. S. 1, 78 L. Ed. 131. The goods in that case were brought into Minnesota and were sold to the party taxed, who held them for future sale. The contention in that case was that the taxpayer contemplated a future sale of goods in interstate commerce.

Federal Compress & Warehouse Company v. McLean, 291 U. S. 17, 78 L. Ed. 622. Held that the tax accrued while the goods were in storage and before interstate commerce had begun.

II.

THE CONTRACTS OF SALE WERE HONESTLY ENTERED INTO AND WITH NO INTENT TO DEFRAUD THE STATE OF THE TAX.

This part of the argument is perhaps immaterial if it were not for the fact that the Courts sometimes refuse to aid the party against whom the tax is imposed if he has attempted to escape the tax by fraudulent means, even though the taxpayer claims constitutional protection.

There is no evidence of fraud of any kind and the Commonwealth so admitted (R. 25):

> "Well, there is no question of dishonesty, I want to say it right here, there is no question at all of dishonesty in this case."

The question of fraud would not be referred to here at all if it were not for the fact that the Courts below stated that the tax authorities discovered by means of an audit made some six months later that the gasoline had been brought into Pennsylvania, thus inferring that the Commonwealth was by reason of this delayed knowledge deprived of its opportunity to collect the tax from appellant's purchasers even if it had so desired.

The answer is that such a statement was not in any way justified because, as evidenced by documents and Commonwealth admissions,

(1) Appellants did report the shipments (Appellant's Exhibit 2, R. 31)

(2) The taxing authorities knew of these shipments as they were coming in.

That appellants did report the shipments to the Department of Revenue is evidenced by appellant's Exhibit 2 (R. 31) dated October 3, 1931, which report showed such shipments to be 111,345 gallons. The audit referred to by the Courts below was made May 10, 1932, more than five months after said Exhibit No. 2, and this audit showed exactly the same number of gallons as said letter (R. 10, 14) to wit 111,345 gallons.

That the Department of Revenue knew of these shipments as they came in is evidenced by admissions made by Mr. Fryburg, Assistant Commissioner of Liquid Fuels in charge of these transactions for the Commonwealth.

When Mr. Fryburg was asked if he knew about these shipments he stated (R. 14):

"A. We knew it from both parties.

Q. How did you know that from the Wiloil Corporation?

A. We were in consultation with Mr. Gahagan, the President of Ace Oil Company. He was an unregistered distributor, he asked permission to buy gasoline from you if he paid you the tax. We consented to that arrangement."

We submit that the Department of Revenue *has no authority to impose a tax except under the provisions of the Taxing Act and no consent arrangement, agreement, or the fact that both the appellant and the Department of Revenue misconstrued the Act, will justify the imposition of the tax against appellant.*

Mr. Fryburg also admitted that he knew of these shipments through the railroad carrier (R. 8):

"A. They are a tabulation record of the gallonage of the Wiloil says that they purchased, as

> against the gallonage that the shipper claims they shipped to the Wiloil; also the record that the railroad send us every month of the tank cars of gasoline that is delivered during the month to the various distributors."

If the Commonwealth has lost the tax it was through its own neglect and not through any fault of appellant. Furthermore, had the taxing authorities not misconstrued the tax and had claimed it against the purchasers as they should have done, they were in a position to bring extreme pressure upon the purchasers as Section 3 of the Act imposes severe penalties, fine, and/or imprisonment for failure to make returns and pay the tax.

Appellants, as required by the taxing act, became a permit holder but, being ignorant of the interstate commerce question, included the tax in its invoice to the purchaser.

A short time after the transactions were entered into appellant referred the contracts of sale to counsel and it was advised at that time that the appellant was not the taxpayer but that the purchasers were the parties liable under the act, and were further advised to notify the taxing authorities immediately of the interstate shipments. Appellant's notice, Exhibit 2 (R. 31) above referred to was the result of this advice.

Therefore, the taxing authorities were notified in ample time to have settled the tax against the purchaser, the proper taxpayer, if they had cared to do so, but it is evident that they themselves also overlooked the effect of interstate commerce and misapplied the act.

Wherefore, it is respectfully submitted that this case is rightfully before this Court on appeal and should be reversed, but if it should be determined that this Court is without jurisdiction on appeal, it is respectfully submitted that it is a case calling for the exercise by this Court of its supervisory powers and this Court should, on a writ of certiorari, review the decision of the Supreme Court of Pennsylvania and finally reverse it. The above is as originally petitioned. (See page 16 of the "Statement as to Jurisdiction").

The authority for certiorari is Section 237 (b & c) as amended by the Act of February 13, 1925, Chapter 229, 43 Statutes 937, U. S. C. A. Title 28, Section 344 (b & c). *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282-287 bottom of page and page 293; 66 Law. Ed. 239, 242-245.

Respectfully submitted,

J. SMITH CHRISTY,
Attorney for Appellant.

APPENDIX.

Liquid Fuels Tax Act of 1931, P. L. 149, Purdon's Pennsylvania Statutes Annotated, Title 72, Section 2611 (b), (c), (d), (e) and (o).

Material part of the title of the act:

"Imposing a State tax, payable by those herein defined as distributors, on liquid fuels used or sold and delivered within the Commonwealth" * * *

Section 2 (p. 150):

" 'Distributor.' Any person, as herein defined, who or which—

1. Produces, refines, prepares, blends, distils, manufactures, or compounds liquid fuels in the Commonwealth of Pennsylvania for his own use therein, or for sale and delivery therein.

2. Imports or causes to be imported from any other state or territory of the United States, or from a foreign country, liquid fuels for his own use in the Commonwealth of Pennsylvania, or for sale and delivery in and after reaching the Commonwealth, other than in the original package, receptacle, or container.

3. Imports or causes to be imported from any other state or territory of the United States liquid fuels for his own use in the Commonwealth of Pennsylvania, or for sale and delivery therein, after the same have come to rest or storage therein, whether or not in the original package, receptacle, or container.

4. Purchases or receives liquid fuels in the original package, receptacle, or container in the Commonwealth of Pennsylvania for his own use,

or for sale and delivery therein, from any person who has imported the same from a foreign country.

5. Purchases or receives liquid fuels in the original package, receptacle, or container in the Commonwealth of Pennsylvania for his own use therein, or for sale and delivery therein, from any person who has imported the same from any other state or territory of the United States, in case such liquid fuels have not, prior to such purchase or receipt, come to rest or storage in the Commonwealth of Pennsylvania.

6. Receives and, in any manner, uses or distributes liquid fuels in the Commonwealth of Pennsylvania on which the tax provided for in this act has not been previously paid. * * *"

Section 3 (p. 152):

"Liquid Fuels Permit and Bond.

(a) On and after the effective date of this act, it shall be unlawful for any distributor to continue to engage in, or thereafter to begin to engage in, the use or sale and delivery of liquid fuels within this Commonwealth unless a liquid fuels permit or permits shall have been issued to him as hereinafter prescribed. * * *"

This section also provides penalties for violations, requires distributors to procure permits, and how the permits may be acquired.

Section 4 (p. 154):

"Imposition of Tax; Exemptions and Deductions.—A State tax of three cents a gallon, or fractional part thereof, is hereby imposed and assessed upon all liquid fuels used or sold and delivered by distributors within this Commonwealth, excepting liquid fuels, delivered to the United States government on presentation of a duly authorized

United States government exemption certificate or other evidence satisfactory to the department, and such liquid fuels used or sold and delivered as are not within the taxing power of this Commonwealth under the Commerce Clause of the Constitution of the United States: Provided, That the tax herein imposed and assessed shall be collected by and paid to the Commonwealth but once in respect to any liquid fuels.

Distributors shall be liable to the Commonwealth as taxpayers for the payment of the tax imposed by this act. * * *"

Section 5 (p. 155):

"By Whom Tax is Payable.—Every distributor using or delivering liquid fuels upon which a tax is imposed by this act shall pay the tax into the State Treasury, through the department, in the manner and within the time specified in this act; but whenever liquid fuels are delivered within the Commonwealth by one distributor to another distributor holding a permit under this act, the distributor receiving such liquid fuels shall separately show, in his monthly reports to the department, all such deliveries from each distributor, and shall pay the liquid fuels tax provided for by this act upon all such liquid fuels used or sold and delivered by him within this Commonwealth. The distributor making such deliveries shall separately show the same in his monthly reports to the department, and shall thereupon be exempt from the payment of the tax which would otherwise be imposed upon the liquid fuels so delivered. It shall be the duty of each distributor to furnish to the department such information concerning such deliveries as the department may require. The department shall furnish to any distributor, upon

request, a list of distributors holding permits under this act, and their addresses.

Distributors may add the amount of the tax to the price of liquid fuels sold by them, and shall state the rate of the tax separately from the price of the liquid fuels on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of liquid fuels. * * *"

Section 6 (p. 155):

"Distributor's Report and Payment of Tax.—For the purpose of ascertaining the amount of tax payable under this act, it shall be the duty of every distributor, on or before the last day of each month, to transmit to the department, upon a form prescribed, prepared, and furnished by the department, a report, under oath or affirmation, of the liquid fuels used or delivered by him within this Commonwealth during the preceding month. Such report shall show the number of gallons of liquid fuels used or delivered within the Commonwealth during the period for which it is made, and such further information as the department shall prescribe. A distributor having more than one place of business within this Commonwealth shall combine, in each report, the use or delivery of liquid fuels at all such separate places of business.

Every distributor, at the time of making every report required by this section, shall compute and pay to the department the tax due to the Commonwealth on liquid fuels used or sold and delivered by him during the preceding month, less a two per centum discount if the report is filed and the tax paid on time. The amount of all taxes imposed under the provisions of this act for each month shall be due and payable on the last day of the next succeeding month, and shall bear inter-

est at the rate of one per centum per month, or fractional part of a month, from the date they are due and payable until paid. * * *"

Section 15 (p. 161):

"Reports from Common Carriers.—Every person, including railroad companies, street, suburban and interurban, railway companies, pipe line companies, and water transportation companies, transporting liquid fuels in any manner, either in interstate or intrastate commerce, to a point within this Commonwealth from a point within or without the Commonwealth, shall report, under oath and affirmation, to the department, on or before the last day of each month, for the preceding month, all deliveries of liquid fuels made to points within this Commonwealth. * * *"

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DEC 7 1
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM 1934, No. 439.

WILOIL CORPORATION, *Appellant*

v.

COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR APPELLEE

Appeal from the Supreme Court of Pennsylvania

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Attorney General of Pennsylvania.

JOHN Y. SCOTT,
Deputy Attorney General.
Attorneys for Appellee.

State Capitol
Harrisburg, Pa.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934. No. 439

WILOIL CORPORATION,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA

Appeal from the Supreme Court of Pennsylvania, May Term 1934, No. 4, Opinion reported in 316 Pa. 33.

BRIEF FOR APPELLEE

ADDITIONS TO APPELLANT'S STATEMENT OF THE CASE

In order to avoid any possible confusion as to the exact facts of this case, we feel it necessary to make certain additions to appellant's statement of the case.

Appellant is a Pennsylvania corporation with its principal place of business in that State, (R. 17). It is engaged in selling liquid fuels at wholesale and holds a permit so to do under the State tax act (R. 35, 51).

All of the liquid fuels in question were ordered through appellant's Philadelphia agent by purchasers in that city (R. 26). In each case the contracts to sell were subject to, and received, the approval of appellant in Pennsylvania at its Pittsburgh office where a record covering all orders was kept. (R. 17, 26).

Shipments of liquid fuels to fulfill these contracts were made in the manner described in appellant's statement of the case. However, it did not appear that appellant actually owned the liquid fuels in question at the time the contracts for their sale was made.

Appellant charged to the purchasers the amount of the tax on the sale of the liquid fuels in question, and the invoices rendered by appellant to the purchasers set out the tax as a separate item of the total amount billed.

SUMMARY OF ARGUMENT

Appellant, a Pennsylvania corporation, made a contract for the sale and delivery of liquid fuels to certain purchasers in Philadelphia, Pennsylvania. At the time of the agreement the liquid fuels were unascertained. To perform its part of the contract, appellant obtained liquid fuels in Wilmington, Delaware and had them shipped to its purchasers under conditions whereby delivery was made and title passed in Philadelphia.

Under the circumstances, we contend that the imposition of a state tax upon the sale and delivery of the liquid fuels did not constitute an undue burden on interstate commerce but only affected it remotely and incidentally.

There is no decision of this court to the contrary; and certain apparently adverse statements in decisions, which are not relevant on their facts, were made without reference to a situation such as this.

Principles relating to the power of Congress to regulate interstate commerce generally are inapplicable; the question is whether a particular exercise of the state's power to tax in view of its nature and operation presents any obstacle to the execution of the national policy.

ARGUMENT

1. Taxation of the Sale and Delivery of the Liquid Fuels was not an Unconstitutional Burden on Interstate Commerce.

Generally speaking, a state may not levy a tax which directly burdens interstate commerce. However, the mere fact that a tax indirectly or incidentally affects interstate commerce does not constitute a burden on it.

In HUMP HAIRPIN MANUFACTURING CO. v. EMMERSON, 258 U. S. 290 (1922), this rule was stated by Mr. Justice Clarke as follows (p. 294):

> "* * * While a state may not use its taxing power to regulate or burden interstate commerce, * * * on the other hand **it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid** where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal constitutional rights. As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principle of the cases so holding must be regarded as a settled exception to the general rule. * * * The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon, it, or whether it affects it only incidentally or remotely,

so that the tax is not in reality a burden, although in form it may touch, and, in fact, distantly affect, it.

"No formula has yet been devised by which it can be determined in all cases whether or not such a tax is valid; and, applying the repeated declaration of this court, in the cases cited and in many others, that the question is inherently a practical one, depending for its decision on the special facts of each case, we are clear that the tax here involved falls within the excepted class described, even though the business done with residents of states other than Illinois be regarded as interstate." (Bold face ours).

Under the facts of this case the tax only remotely and incidentally affected interstate commerce.

Both appellant and its purchasers conducted their businesses in Philadelphia. The court of common pleas and the State Supreme Court found as facts that the sale and delivery of the liquid fuels took place in Pennsylvania, and further that the agreement between appellant and its purchasers was a contract for the sale of unascertained goods (R. 43, 52, 53). Appellant specifically states on page 3 of its brief that no question as to these findings is raised here.

The fact that appellant secured the liquid fuels in Wilmington for the purpose of performing its agreement with its purchasers was incidental. Since the agreement of appellant was to sell and deliver liquid fuels in Philadelphia when required by the purchasers it was obviously immaterial to those purchasers where appellant procured the liquid fuels. The agreement

of sale did not contemplate that they be procured in Wilmington or in any other particular place. The contract could have been as well performed had appellant procured the liquid fuels in Pennsylvania. Taxation of the sale and delivery of the liquid fuels by appellant to its purchasers, therefore, only remotely and incidentally affected interstate commerce.

An analogous situation was before this court in WARE & LELAND v. MOBILE COUNTY, 209 U. S. 405 (1908). In discussing one of several varying but related situations presented in that case Mr. Justice Day said (p. 413):

> "* * * When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one state to the place of delivery in another state. And though it is stipulated that shipments were made from Alabama to the foreign state in some instances, that was not because of any contractual obligation so to do. In neither class of contracts, for sale or purchase, was there necessarily any movement of commodities in interstate traffic because of the contracts made by the brokers.
>
> "These contracts are not, therefore, the subjects of interstate commerce any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company. **The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and**

executed the subjects of interstate commerce." (Bold face ours.)

Appellant attempts to distinguish this case as being dissimilar on its facts from the present one. Another portion of the opinion in that case is quoted by appellant to indicate that fulfillment of orders received by the seller from a purchaser in a foreign state was effected by goods purchased for that purpose in such state. While some of the transactions involved were of this nature it is clear that not all of them were; and that the transactions under discussion in the portion of the opinion above quoted were of a different character. The court, as the language indicates, was discussing there a situation differing in no material respect from the one in the present case.

It is impossible to distinguish the present case from that of BANKER BROTHERS CO. v. PENNSYLVANIA, 222 U. S. 210 (1911). In that case Banker Brothers Company was a corporation doing business in Pittsburgh, Pennsylvania as a retail vendor of automobiles. Sales were made by the company before it acquired title to the automobiles sold and were made upon the condition that the purchaser pay the list price of the automobile f. o. b. factory. The factory was that of George N. Pierce Company, in Buffalo, New York. After a sale was made by Banker Brothers Company, the automobile was purchased by them from the factory, and their vendee paid the list price and the freight from Buffalo, New York. Banker Brothers Company was not the agent of the manufacturers but was engaged in business on its own account. The Commonwealth of Pennsylvania sued Banker Brothers Company to

collect a mercantile license tax upon the gross sales of the company to persons in Pennsylvania. This court held that such sales were not transactions in interstate commerce and that the tax was not an undue burden thereon. At page 213 Mr. Justice Lamar said:

> "* * * The fact that he [the purchaser] was liable for the freight by virtue of the agreement to 'pay the list price f. o. b. factory' did not convert it into a sale by the manufacturer at the factory; neither was that result accomplished because, with the machine, Banker Brothers Company also delivered to the buyer in Pittsburg a warranty from the manufacturer direct.
>
> **"These were mere incidents of the intrastate contract of sale between Banker Brothers Company and the purchaser in Pittsburg, who was not concerned with the question as to how the machine was acquired by his vendor,** or whether that company bought it from another dealer in the same city, or from the manufacturer in New York. The contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price. See American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; American Exp. Co. v. Iowa, 196 U. S. 146, 49 L. ed. 423, 25 Sup. Ct. Rep. 182. The court properly held it was not an interstate transaction, but taxable under the laws of Pennsylvania." (Bold face ours.)

Appellant seeks to distinguish the Banker Brothers Case by pointing out that there the cars were shipped originally from a point outside Pennsylvania to Banker Brothers Company, and that the company itself then made delivery in Pennsylvania to the ulti-

mate purchaser. Not only were those facts not made the basis of the decision of this court, but they were barely mentioned in the opinion. It is apparent that the court did not regard them of any particular importance.

Under the principles enunciated in these decisions taxation of the sale and delivery of liquid fuels involved here was not an unconstitutional burden on interstate commerce.

2. The Cases Relied on by Appellant

Appellant principally relies on SONNEBORN BROTHERS v. KEELING, 262 U. S. 506 (1923). The only question actually decided by the court in that case was that a state may tax goods, or the sale thereof, which a foreign corporation has brought into the state and has lodged in its own warehouses, and from which the goods are subsequently sold. The court expressly pointed out that the taxability of sales of goods which were not within the state when sold was not involved (p. 508). The present case involves precisely what the court thus excluded from its discussion.

The appellant quotes from the Sonneborn Case certain language of Chief Justice Taft to the effect that a state may not impose a tax with regard to goods ordered in that state for shipment thereto from another state.

However, in the Sonneborn Case, the sales of goods to be shipped into the state about which the Chief Justice spoke,—but which were not involved in the

actual decision,—were sales by a foreign corporation on orders given to its agent in the state. And without exception, in all the cases cited by the Chief Justice in support of the language relied upon by the appellant, the seller was located in another state than the purchaser and the purchaser made the contract either through a local agent of the non-resident seller or directly with the non-resident seller himself. In all those cases the contract contemplated a shipment from the seller to the purchaser across a state line. The movement in interstate commerce was not simply incidental but was necessarily intended by the parties to the contract of sale. It was only to this state of facts that the language of the Chief Justice was applicable.

In the present case, as well as in the Banker Brothers Case the seller was an independent principal located in Pennsylvania making contracts with purchasers in the same state, although subsequently goods to complete such contracts were procured from persons in another state. Therein lies the true distinction between these cases and the situation discussed in the Sonneborn Case. That it is a real distinction is recognized in WARE & LELAND v. MOBILE, supra.

Here the liquid fuels were shipped to the purchasers direct from a point outside the state but this shipment was incidental to the sale and delivery of the goods. The transactions between the appellant and its purchasers were essentially and fundamentally intrastate transactions.

In the present case the tax was imposed upon the sale and delivery of liquid fuels by appellant in Pennsylvania to its purchasers also in Pennsylvania. The tax was not imposed upon the commodity sold the movement of which an interstate commerce, as we have seen, was incidental to the actual transaction taxed. In other words, the tax involved is an excise tax and not a tax upon property. This was the view taken below by both the Court of Common Pleas and the Supreme Court of Pennsylvania. The appellant here raises a question as to this, for the first time.

Appellant bases its contention that the tax is a property tax on the decision of the Supreme Court of Pennsylvania in COMMONWEALTH v. PURE OIL Co., 303 Pa. 112 (1931). In that case the court had before it a statute passed in 1929 imposing a tax on liquid fuels. The statute, under which the tax in the present case was assessed, was enacted in 1931 and superseded the 1929 act. Whatever may have been the court's opinion as to the nature of the tax under the former act, it is clear from the opinion it rendered in the present case that it construes the present act as imposing an excise tax. The court said (R. 53):

> "* * * **Taxation of the sale or delivery of the gasoline** by appellant to its purchasers, only remotely and indirectly affects interstate commerce."

(R. 57):

> "* * * we are of opinion that the cases herein referred to establish that the gasoline in question, under the facts appearing, was sold and delivered by appellant in Pennsylvania, that **such sale and delivery** did not constitute a transaction in inter-

> state commerce, and that therefore **it was taxable.**" (Bold face ours).

The titles of the two acts are quite dissimilar. The material portion of the title of the Act of 1929 was:

> "Imposing a State **tax on liquid fuels,** including all liquids ordinarily, practically, and commercially usable in internal combustion engines for the generation of power * * *". (Bold face ours).

The corresponding portion of the title of the Act of 1931 is:

> "Imposing a State tax, payable by those herein defined as distributors, **on liquid fuels used or sold and delivered** within the Commonwealth, which are etc. * * *" (Bold face ours).

That the tax imposed by the act here involved is not a tax on property but a tax on **transactions** is clear.

Similar tax statutes have been regarded and treated by this court as imposing excise taxes and not property taxes: PANHANDLE OIL COMPANY v. MISSISSIPPI, 277 U. S. 218 (1928); HELSON AND RANDOLPH v. KENTUCKY, 279 U. S. 245 (1929).

Therefore, the tax was here imposed upon a transaction which was wholly intrastate and not upon the goods. The movement of the goods in interstate commerce, as we have seen, was only incidental to that transaction.

Appellant also relies on FEDERAL TRADE COMMISSION v. PACIFIC STATES PAPER TRADE ASSOCIATION, 273 U. S.

52 (1927). In that case it was held that the Federal Trade Commission had jurisdiction over certain transactions, somewhat similar to those here, because they were in interstate commerce. This court has recently recognized the proposition that the mere fact that the flow of interstate commerce is subject to the regulating power of Congress does not necessarily mean that a state may not tax property or transactions connected with that flow. In MINNESOTA v. BLASIUS, 290 U. S. 1 (1933), Mr. Chief Justice Hughes at page 8 said:

> "But because there is a flow of interstate commerce which is subject to the regulating power of the Congress, it does not necessarily follow that, in the absence of a conflict with the exercise of that power, a State may not lay a non-discriminatory tax upon property which, although connected with that flow as a general course of business, has come to rest and has acquired a situs within the State. The distinction was recognized in Stafford v. Wallace, supra (258 U. S. pp. 525, 526, 66 L. ed. 745, 746, 42 S. Ct. 397, 23 A. L. R. 229), where the Court cited, as an illustration, the case of Bacon v. Illinois, 227 U. S. 504, 57 L. ed. 615, 33 S. Ct. 299, in which such a non-discriminatory property tax was sustained. And the Court in the Stafford Case quoted from the opinion in the Bacon Case, supra, 227 U. S. 516, 57 L. ed. 620, 33 S. Ct. 299) the following statement of the distinction: **'The question'** (that is, as to the validity of the state tax) **'it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority.'"** (Bold face ours).

In STAFFORD v. WALLACE, 258 U. S. 495 (1922), Chief Justice Taft said (p. 525):

> "The other cases relied on by appellants are less relevant to this discussion than the Anderson and Hopkins Cases. Some of them are tax cases. As to them it is well to bear in mind the words of the court in the Swift Case (p. 400):
>
> "'But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress where such interference is deemed necessary for the protection of commerce among the states.'"

In FEDERAL COMPRESS & WAREHOUSE CO. v. MCLEAN, 291 U. S. 17 (1934), Mr. Justice Stone said (p. 23):

> "* * * The mere extension of control over a business by the national government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy. Compare Susquehanna Power Co v. Tax Commission, supra; Broad River Power Co. v. Query, supra. See Willcuts v. Bunn, 282 U. S. 216, 226, 230, 75 L. ed. 304, 307, 309, 51 S. Ct. 125, 71 A. L. R. 1260."

Both of these cases were cited with approval in the very recent case of CHASSANIOL v. CITY OF GREENWOOD, 291 U. S. 584 (1934), which upheld the validity of a state license tax.

It is difficult to understand what direct bearing NORRINGTON v. WRIGHT, 115 U. S. 188 (1885) and WESTERN UNION TELEGRAPH CO. v. FOSTER, 247 U. S. 105 (1918) have upon the question involved in this

case. They seem to be cited in an attempt to exclude from consideration by this court of the construction which the Supreme Court of Pennsylvania placed upon the contracts of sale between appellant and its purchasers. But that is part of the case, and appellant has not attempted to question it here. In this connection, however, the language of Mr. Justice Stone in FEDERAL COMPRESS & WAREHOUSE Co. v. MCLEAN, supra, would seem to be apropos (p. 22):

> "* * * It is not within the power of the parties, by the descriptive terms of their contract, to convert a local business into an interstate commerce business protected by the interstate commerce clause. See Merchants Warehouse Co. *v.* United States, 283 U. S. 501, 507, 508, 75 L. ed. 1227, 1235, 1236, 51 S. Ct. 505; Superior Oil Co. *v.* Mississippi, 280 U. S. 390, 74 L. ed. 504, 50 S. Ct. 169; Browning *v.* Waycross, 233 U. S. 16, 23, 58 L. ed. 828, 832, 34 S. Ct. 578."

3. Conclusion

The court below followed BANKER BROTHERS Co. v. PENNSYLVANIA, and WARE AND LELAND v. MOBILE COUNTY, supra, in holding that the imposition of liquid fuels tax under the circumstances of this case did not impose a burden upon, and that it only remotely and incidentally affected, interstate commerce.

We submit that the authority of these cases, and their application to the facts of this case, is not affected by the statements in SONNEBORN BROTHERS v. KEELING, and FEDERAL TRADE COMMISSION v. PACIFIC STATES PAPER TRADE ASSOCIATION, which are relied upon by the appellant.

Therefore we respectfully submit that the judgment of the Supreme Court of Pennsylvania should be affirmed.

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JOHN Y. SCOTT,
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Attorneys for Appellee.

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Supreme Court of the United States

OCTOBER TERM, 1934.

NO. 439

WILOIL CORPORATION, Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA.

Appeal From the Supreme Court of Pennsylvania.

PETITION FOR REHEARING.

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WILOIL CORPORATION, Appellant,

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Appeal From the Supreme Court of Pennsylvania.

PETITION FOR REHEARING.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Appellant, Wiloil Corporation, by its counsel respectfully petitions your Honorable Court for rehearing of the above case and submits that the Court erred in the following particulars:

I.

Appellant was not concluded by the State Court's finding that the liquid fuels were "sold and delivered" in Pennsylvania because that finding involved the one and only Federal question raised, to wit, interstate commerce, and those words must be read in connection with Section 4 and Section 2 of the taxing act (appellant's brief—appendix pages 31 and 30).

II.

Before the tax accrued under the terms of the taxing act the liquid fuels were required to be in Pennsylvania or, if imported, had "come to rest" in Pennsylvania in the control of the taxpayer, or the original package broken up. The act, Section 2 (appendix 30), paragraphs 2 and 5, clearly defines what transactions "come to rest" under the Act and if there could be any other manner not defined in the Act in which the goods could "come to rest" in a taxing sense, that would not justify the tax because the Act itself has definitely declared what constitutes "come to rest".

Paragraph 6 of said Section 2 will not justify the tax because the taxpayer must "receive *and* distribute liquid fuels in Pennsylvania" and under the finding of the State Court appellant received the goods at Wilmington, Delaware.

III.

The Act, we submit, conclusively shows (Sections 4 and 2, pages 31 and 30 appendix) that there was no attempt or any intention whatsoever by the Act to tax the contract of sale.

IV.

Since under the terms of the Act the goods must be within Pennsylvania or if imported "come to rest" within the definitions of that term declared in the Act, and the Act not taxing the contract of sale itself, there can be no application of the doctrine that commerce is only incidental.

Admitting that the goods were in the constructive possession of appellant while in actual possession of the

carrier, because of the State Court's finding that the title did not pass to the purchaser until the goods arrived at Philadelphia, nevertheless during that constructive possession they were rolling along in interstate commerce, as that commerce was understood and contemplated by the terms of the Act and *eo instante* the car stopped on the private siding of the purchaser the goods "came to rest" for the first time, but, under the law of sales, in the hands of the purchaser, the one and only one taxable under the terms of the Act.

V.

Summarizing the above: Sections 4 and 2 of the taxing act (Appendix—appellant's brief pages 31 and 30) must be read together and when so read it becomes apparent that the Act itself recognized and acknowledged that a transaction the same as involved in this case was one in interstate commerce and clearly excepts such transaction from the tax imposed by the Act.

When the act itself defines an interstate transaction and because of it being such excepts the transaction from the tax, then this Court, we respectfully submit, in affirming the judgment imposing the tax, if our contention be correct, which we feel confident it is, has done so without any taxing act to support its judgment. The State Court gave no construction of the Act by which this Court is bound. It said nothing more than that interstate commerce was not involved because it was incidental, which is a Federal question, and as stated before that doctrine, when read with the Act, has no application.

VI.

The Commonwealth admissions (page 26 appellant's brief) show conclusively, we are convinced, that the appellant was innocent of any attempt to wrongfully escape the tax.

Respectfully submitted,

WILOIL CORPORATION

By J. SMITH CHRISTY,
Counsel.

Counsel hereby certifies that the above petition is presented in good faith and not for delay.

J. SMITH CHRISTY.

SUPREME COURT OF THE UNITED STATES.

No. 439.—October Term, 1934.

Wiloil Corporation, Appellant,	)	Appeal from the Supreme
vs.	)	Court of the Common-
Commonwealth of Pennsylvania.	)	wealth of Pennsylvania.

[February 4, 1935.]

Mr. Justice Butler delivered the opinion of the Court.

This case, coming before the court of common pleas of Dauphin county upon the appeal of the company from determinations of state taxing authorities, is an action by the Commonwealth against appellant to recover a tax under § 4 of the Liquid Fuels Act of 1931. P. L. 149. By that act a tax of three cents a gallon is imposed "upon all liquid fuels used or sold and delivered by distributors within this Commonwealth" and distributors are made liable for the payment of the tax. They may add the amount of the tax to the price and are required on all delivery slips or bills to "state the rate of the tax separately from the price of the liquid fuels". Appellant maintained below and it insists here that, construed to impose the tax in question, the statute is repugnant to the commerce clause of the Federal Constitution, Art. I, § 8, cl. 3. The trial court held otherwise and gave judgment for the amount claimed. The supreme court affirmed. 316 Pa. 33.

Appellant, a Pennsylvania corporation having its principal place of business in Pittsburgh, sells liquid fuels at wholesale and is a distributor as defined by the act. The tax in controversy was laid at three cents per gallon upon the contents of 13 tank cars sold and delivered by it. All were ordered through its agent in Philadelphia for delivery to purchasers at that city or at Essington Pennsylvania. The orders specified a price per gallon "f. o. b. Wilmington, Del., plus 3¢ tax," and were subject to, and received, appellant's approval at its office in Pittsburgh. The purchasers were not licensed or taxable as distributors. All fuels delivered under these contracts were obtained from Crane Hook Company of Wilmington, Delaware, and on the order of appellant were

shipped by rail from there to the purchasers in Philadelphia or Essington. Each car moved on a bill of lading in which the appellant was consignor and the purchaser was consignee; the place of shipment indicated was Wilmington and the place of destination was consignee's private siding in Philadelphia or Essington. Appellant prepared and sent to the buyer an invoice covering each shipment showing the price as stated in the order.

The inference that might be drawn from the f. o. b. order, the billing and straight bill of lading that the parties intended delivery to purchaser at place of shipment is negatived by other circumstances. The contracts were executory and related to unascertained goods. Section 19, Rule 4 (2), Act of May 19, 1915, P. L. 543, 548. It does not appear that when they were made appellant had any fuels of the kinds covered or that those to be delivered were then in existence. There was no selection of goods by purchasers. Appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania. It is the practice in appellant's business to sell f. o. b. at a specified place in order to fix the price and such billing may be merely price fixing and not an indication of the source or place of shipment. The reference to the tax in the orders and invoices would have been unnecessary if delivery were not to be made in Pennsylvania for if made at Wilmington, the transactions would not have been within the provision of the taxing act. Upon these considerations, the state supreme court held that the liquid fuels in question were by appellant "sold and delivered" to purchasers in Pennsylvania. And see *Dannemiller* v. *Kirkpatrick,* 201 Pa. 218, 224. *Frank Pure Food Co.* v. *Dodson,* 281 Pa. 125. *Charles E. Hires Co.* v. *Stromeyer,* 65 Pa. Sup. Ct. 241, 243. The ruling is not challenged by appellant and is binding upon it here.

These contracts did not require or necessarily involve transportation across the state boundary. The precise question is whether the mere fact that appellant caused the fuels to be shipped from Delaware for delivery in tank cars—deemed original packages (*Askren* v. *Continental Oil Co.,* 252 U. S. 444, 449)—on purchasers' sidings as agreed makes imposition of the tax repugnant to the commerce clause. There is nothing to indicate legislative purpose to discriminate against liquid fuels brought into Pennsylvania to be delivered in fulfillment of sales contracts or there

to be used or sold. The commerce clause does not prevent taxation of goods by the State in which they are found merely because brought from another State, for that would unduly trammel state power of taxation and produce gross inequality and injustice. *Woodruff* v. *Parham,* 8 Wall. 123, 137. The limitation appellant puts on § 4 would operate to the extent of three cents a gallon in favor of liquid fuels delivered, as in this case, from a place in another State against those delivered in Pennsylvania from sources in that Commonwealth over routes wholly therein. And, if that section may not be constitutionally construed to tax the shipments here in question, then equally free from the burden must be liquid fuel transported by rail or truck from Pennsylvania sources to places of delivery in that State over any route not wholly therein.

Our decisions show that, if goods carried from one State have reached destination in another where they are held in original packages for sale, the latter has power without discrimination to tax them as it does other property within its jurisdiction. *Woodruff* v. *Parham, supra. Brown* v. *Houston,* 114 U. S. 622, 632. *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 519-522. *Sonneborn* v. *Cureton,* 262 U. S. 506. And as that rule applies whether the burden falls directly or indirectly (*Banker Bros* v. *Pennsylvania,* 222 U. S. 210) it is not material whether the tax is upon the sale and delivery or upon the property. Admittedly the sales contracts were made in Pennsylvania. Deliveries to purchasers at destination were made in accordance with the terms of the sales. As interstate transportation was not required or contemplated, it may be deemed as merely incidental. Cf. *Moore* v. *N. Y. Cotton Exchange,* 270 U. S. 593, 604. *Ware & Leland* v. *Mobile County,* 209 U. S. 405, 412-413. The act lays no burden on interstate commerce as such and, if any can be said to result from the imposition, it is indirect and precisely as th[illegible] which would have resulted if deliveries had been made exclusively by intrastate transportation from Pennsylvania sources. We need not consider whether deliveries to purchasers ended the interstate commerce involved including all incidents that in other connections might constitute an essential part of that which is covered by the commerce clause. Cf. *Fed. Trade Com.* v. *Pac. Paper Assn.,* 273 U. S. 52, 63. Upon the principle applied here recently in *Minnesota* v. *Blasius,* 290 U. S. 1, the liquid fuels were taxable in Pennsylvania.

Affirmed.